REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

COURTS OF COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

AND IN THE

HOUSE OF LORDS:

FROM

HILARY TERM 42 *GEO.* III. 1802,

TO

EASTER TERM 44 *GEO.* III. 1804,

BOTH INCLUSIVE.

With Tables of the Cases and Principal Matters.

By JOHN BERNARD BOSANQUET, of LINCOLN'S INN, Esq. Barrister at Law and CHRISTOPHER PULLER, of THE INNER TEMPLE, Esq. Barrister at Law

Ut non difficile sit, quæcunque nova causa, consultatione acciderit, ejus tenere jus. CIC. DE LEG.

VOL. III.

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1804.

JUDGES

OF THE

COURT OF COMMON PLEAS

During the Period contained in this Volume.

Right Honourable RICHARD PEPPER Lord ALVANLEY, Lord Chief Juſtice.
Honourable JOHN HEATH, Eſq.
Honourable Sir GILES RODKE, Knt.
Honourable Sir ALAN CHAMBRE. Knt.

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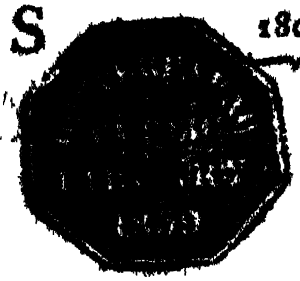

ARGUED and DETERMINED

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

IN

Hilary Term,

In the Forty-second Year of the Reign of GEORGE III.

BATTEN v. HARRISON Gent. One, &c.

Jan. 27th.

Notice of executing a writ of inquiry on "*Tuesday* the 14th day of *January* instant" when the 14th of *January* fell on a *Thursday*, and on which day the writ of inquiry was executed, the Court of *C. B* refused to set aside the execution of the writ of inquiry for this irregularity, but rejected "*Tuesday*" as surplusage, it appearing that the defendant was not misled thereby.

A RULE *Nisi* had been obtained, calling upon the Plaintiff to shew cause why a writ of inquiry executed in this cause should not be set aside for irregularity. The irregularity complained of was that the notice of executing the writ of inquiry received by the Defendant was for "*Tuesday* the 14th day of *January* instant;" whereas the 14th of *January* fell on a *Thursday*, and on which day the writ of inquiry was in fact executed. It appeared that on the morning of *Thursday* the 14th the Plaintiff's attorney met the Defendant, who told him that his notice was irregular and he should not attend the inquiry, but did not point out to the Plaintiff's attorney what the irregularity was.

Williams Serjt. now shewed cause against the rule, and contended that the Court would, by rejecting the word "*Tuesday*" as

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ſurpluſage, cure the irregularity, and obſerved that it was not neceſſary for the Plaintiff to have done more than mention the day of the month, without introducing the day of the week. He cited *Doe d. Duke of Bedford* v. *Kightley*, 7 *Term Rep.* 63. where the Court of *King's Bench* held a notice to quit at "*Lady-day* which will be in the year 1795," the ſame being delivered at *Michaelmas* 1795, to be ſufficient to ſupport an ejectment, the year 1795 being rejected as impoſſible.

Clayton Serjt. *contrà* inſiſted that the Court would not go out of its way to cure an irregularity ariſing from negligence, and that if they muſt reject either the day of the month or the day of the week inſerted in the notice in order to make it ſenſible, they would not reject that which would operate as a puniſhment upon the Defendant who had not been irregular.

Lord ALVANLEY Ch. J. It is clear that the Defendant was not miſled by this error in the notice, but that relying on the irregularity he neglected to attend the execution of this writ of inquiry. But though *Tueſday* was by a clerical miſtake introduced inſtead of *Thurſday*, yet the notice being for "*Tueſday* the 14th of *January inſtant*," a given day does ſeem to be thereby pointed out. The caſe of the notice to quit appears to me a very ſtrong authority in favour of our rejection of the word "*Tueſday*," and thus making it a regular notice of a writ of inquiry to be executed on the 14th of *January*. Therefore as the Defendant is not ſtated to have ſuſtained any injury by his non-attendance at the execution of the writ of inquiry, I think it ought not to be ſet aſide.

ROOKE J. (*a*) If it were not for the caſe of *Doe* v. *Kightley* I ſhould be diſpoſed to liſten to the objection taken to the execution of this writ of inquiry, however ſtrict and technical it may be. But ſince that caſe the point does not appear to me to be altogether *res integra*, and I think therefore we are warranted in rejecting as ſurpluſage the word "*Tueſday*" in this notice, in the ſame way as the Court of *King's Bench* rejected an impoſſible year in a notice to quit in order to ſupport an ejectment. The day of the week need not have been introduced into the notice, and if rejected will leave it a good notice for the 14th of *January*.

CHAMBRE J. I entertain ſome doubt upon this point. It is certainly of very great importance to parties that they ſhould have

(*a*) Mr. Juſtice *Heath* was prevented from attending in Court by indiſpoſition until the 9th of *February*.

due

due notice of the time at which their rights are to be discussed; and if the notice given be insufficient they are entitled to avail themselves of that insufficiency. The case of *Doe* v. *Kightley* does not appear to me analogous, because that being a notice to quit it was quite obvious to the tenant that it was given with a view to determine the holding between himself and his landlord from a certain period not arrived at the time of the delivery of the notice, and that therefore the insertion of the past year was a mere mistake. I think however that the notice in this case could not well be understood to be a notice for any other day than the 14th of *January*. Leave out any other word than "*Tuesday*," and the notice will be mere nonsense. If therefore it could not mislead the Defendant and there be no other way of making the notice intelligible than by striking out the word "*Tuesday*," I think the Defendant is not entitled to have this writ of inquiry set aside.

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Rule discharged.

DEFFLIS *v.* PARRY.

Jan. 27th.

THIS was an action on a policy of insurance upon goods on board the *Friendlyke* lost or not lost at and from *Rotterdam* to *London* against all risks, *British* captures included. The declaration, after setting out the policy, and making the usual averments, alleged, that the *Friendlyke* with the said goods on board was captured on the high seas by the *French*; and that at the time of the sailing of the said vessel with the goods on board upon the voyage aforesaid, the Plaintiff had the leave and licence of our Lord the King for bringing the said goods and merchandises in the said vessel from *Rotterdam* aforesaid to *London* aforesaid.

If a licence be obtained from the *British* Government by *A.* to import from an enemy's country in six ships such goods as should be specified in his bills of lading; and goods be imported on board one of the six ships on account of *B. C.* and *D.* to whom several bills of lading are sent for their respective goods, and one general bill of lading for the whole cargo be sent to *A.*; the whole cargo will be protected.

The Defendant having pleaded the general issue the cause came on to be tried before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after last *Michaelmas* Term, when it appeared that Messrs. *Bridge* and *Smith*, merchants of *London*, on the 21st *February* 1801, obtained a licence from the Crown in the following terms: "*George* the Third, *&c.* To all commanders of our ships of war and privateers, and all others whom it may concern, greeting: Our will and pleasure is, that you permit Messrs. *Bridge* and *Smith*, or their agents, or the bearer of their bills of lading on board six ships, the names of which they are unable to set forth, the

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the ſame being *American*, *Pruſſian*, or belonging to any of the *Hans Towns*, to import without moleſtation from *Rotterdam*, *Amſterdam*, and *Dort*, to the port of *London*, ſuch quantity of flax, flax ſeeds, clover and other ſeeds, madders, *&c.* being *Britiſh* or neutral property, as may be ſpecified in their bills of lading, provided the ſame ſhall be ſhipped as aforeſaid: this licence to remain in force for the ſpace of ſix months from the date thereof and no longer: Provided alſo, that any perſon who ſhall claim the benefit of the licence hereby granted, ſhall take and have the ſame upon condition, that if any queſtion ariſe in any of our Courts of Admiralty or elſewhere, whether ſuch perſon or perſons hath or have in all points conformed thereto in all caſes whatſoever, the proof ſhall lie upon the perſon or perſons uſing this our licence, or claiming the benefit thereof. Given at our Court of *St. James's* the 21ſt day of *February* 1801, in the 41ſt year of our reign." That on the 20th of *February* 1801, the Plaintiff having been recommended by Meſſrs. *Bridge* and *Smith* to Meſſrs. *James Smith* and Son of *Rotterdam*, wrote to the latter, directing them to purchaſe ſome caſks of madder; that Meſſrs. *J. Smith* and Son accordingly did purchaſe eight caſks of madder, the goods inſured, and on the 27th of *March* following ſhipped them on board the *Friendlyke*; the Captain of which veſſel ſigned three bills of lading, whereby he promiſed to deliver the eight caſks of madder to the ſhippers or their order; that on the ſame day Meſſrs. *J. Smith* and Son wrote a letter to the Plaintiff, incloſing the invoice and one of the above bills of lading, indorſed in blank, and appriſing him that they had ſo ſhipped the goods, and that they ſhould draw for the amount; that on the 24th of *April* following one bill of lading for the whole cargo of the ſhip *Friendlyke* was ſigned by the Captain, and indorſed by Meſſrs. *J. Smith* and Son to Meſſrs. *Bridge* and *Smith* of *London*, to whom the Captain was addreſſed, with directions to follow their orders; that Meſſrs. *J. Smith* and Son drew bills of exchange upon the Plaintiffs for the amount of the goods inſured, and remitted them to Meſſrs. *Bridge* and *Smith*, which bills the Plaintiff afterwards accepted; and that Meſſrs. *Bridge* and *Smith*, according to the courſe of trade between themſelves and Meſſrs. *J. Smith* and Son, would, under the general bill of lading of the whole cargo, have withholden the goods for which the Plaintiff held a particular bill of lading, if the Plaintiff had not duly accepted the bills drawn by Meſſrs. *J.*

Smith and Son to anſwer the amount of the goods. The Jury found a verdict for the Plaintiff, but liberty was reſerved to the Defendant to move to have a nonſuit entered.

Accordingly *Lens* Serjt. on this day moved for a rule *Niſi* contending, that the goods inſured were not protected by the letter of licence, ſince the Plaintiff, upon whoſe account the goods were ordered, was not to be conſidered as the agent of *Bridge* and *Smith*, or as the holder of their bill of lading; that the bill of lading indorſed by the ſhippers, and ſent to the Plaintiff, veſted in the latter a complete authority to demand the goods; and that the general bill of lading ſent to *Bridge* and *Smith*, which was of a ſubſequent date to that ſent to the Plaintiff, could convey no right to *Bridge* and *Smith* to withhold the goods from the Plaintiff; and that as three bills of lading had been made out according to the uſual courſe reſpecting the goods ſent to the Plaintiff, and only one general bill of lading for the whole cargo, it manifeſtly appeared that the former were the regular bills of lading, whereas the latter was only a fictitious inſtrument for the purpoſe of protecting the property of thoſe who were not within the terms of the licence.

Lord ALVANLEY Ch. J. It appears to me to have been the intention of Government in granting the licence to authoriſe this ſort of importation; the words of the licence are extremely general, but an attempt is now made to confine the terms of it to goods purchaſed for *Bridge* and *Smith* on their own account; but had this been the intention the licence would have been otherwiſe expreſſed. The courſe of proceeding is this: *Bridge* and *Smith* having obtained a licence which is to be in force for ſix months, their correſpondent ſhips a cargo of goods under a general bill of lading to *Bridge* and *Smith*; and with this bill of lading on board no cuſtom-houſe officer would have dared to ſtop them. But then it is ſaid that part of this cargo was not ſhipped on the account of *Bridge* and *Smith*. I have no difficulty however in ſaying, that it was the intention of Government that any goods which ſhould come to this country under their bill of lading, and with their permiſſion, ſhould be protected by the li[redacted]e. I believe it to be within the knowledge of govern[redacted] this ſort of uſe is made of the licences granted to indivi[redacted]uals. We are not to conſtrue the acts of Government ſtrictly againſt the merchants; if it had been intended that the licence ſhould have been more confined, I think it would have been ſo expreſſed. It ap-

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pears to me that a fair uſe has in this inſtance been made of the licence, the terms of which fully warranted the tranſaction.

ROOKE and CHAMBRE Js. were of the ſame opinion.

Rule diſcharged.

Jan. 28th.

PERCY and Others Adminiſtrators of W. HOOK *v.* POWELL.

The Court will not diſcharge a defendant out of cuſtody on a common appearance, on the ground of a commiſſion of bankruptcy having been ſued out againſt him by the plaintiff as petitioning creditor upon the ſame debt as that on which the arreſt is founded.

An affidavit to hold bail made by adminiſtrators of a perſon who died before the paſſing of the Bank act need not negative a tender in Bank notes to their inteſtate.

Semb. that perſons ſueing as adminiſtrators need not in any caſe negative ſuch tender to their inteſtate.

HIS was an application to diſcharge the Defendant out of the cuſtody of the ſheriff of *Middleſex* upon his entering a common appearance. It was moved upon two grounds; 1ſt, That a commiſſion of bankruptcy had been ſued out by the preſent Plaintiffs as petitioning creditors, founded upon the ſame debt for which they had now arreſted the Defendant; 2dly, That the affidavit of debt which was ſworn by one of the Plaintiffs as an adminiſtrator, only negatived any tender in bank notes to either of the adminiſtrators, but not to the inteſtate.

Beſt Serjt. ſhewed cauſe, and with reſpect to the firſt ground referred the Court to the ſeveral caſes of *M'Maſter* v. *Kell*, *ante*, vol. 1. p. 302. *Hill* v. *Reeves*, *ante*, vol. 1. p. 424. and *Oliver* v. *Ames*, 8 *Term Rep.* 364. where applications of this kind had been refuſed by the Courts on the ground of a want of juriſdiction, ſaying the Court of Chancery muſt be applied to for relief; and in anſwer to the ſecond objection produced an additional affidavit, ſtating, that the inteſtate died in 1796, previous to the paſſing of the Bank act, which firſt made the negativing a tender in bank notes a neceſſary part of the affidavit to hold to bail.

Shepherd Serjt. in ſupport of the application urged that the Court would not allow its proceſs to be uſed for the purpoſe of haraſſing a man by two different modes of legal execution, *viz.* an execution againſt his goods by the commiſſion of bankruptcy, and an execution againſt his perſon by arreſt, and obſerved that the caſe now before the Court was the ſtrongeſt which could be brought before them; for that though the Court of Chancery will allow a creditor to prove, and then make his election either to proceed under the commiſſion, or at law, provided he wave his proof, yet that Court will not allow a petitioning creditor (in which ſituation the Plaintiffs ſtood) the ſame indulgence, ſuch a creditor being obliged to abide by his proof. He urged on the

second objection, that though the inteſtate was dead ſo early as 1796, ſtill the Plaintiffs were bound under the proviſions of the Bank act to negative any tender to ſuch perſon.

But *The Court* were of opinion, that the firſt objection was completely anſwered by the caſes referred to, particularly that of *M'Maſter* v. *Kell*, where the party arreſting was as in this caſe the petitioning creditor, and added that they could not tell but that the Defendant might conteſt the commiſſion of bankruptcy; the ſecond objection they held to be done away by the fact diſcloſed in the ſubſequent affidavit of the inteſtate's death previous to the paſſing of the Bank act; and *Rooke* J. added that had that not been the caſe he ſhould have thought it unneceſſary for the Plaintiffs ſuing in their character of adminiſtrators to negative a tender to their inteſtate (*a*).

Per Curiam, Rule diſcharged (*b*).

(*a*) It has however been held by the Court of *K. B.* that aſſignees in an affidavit to hold to bail muſt negative a tender to the bankrupt before his bankruptcy to the beſt of their belief. *Martin* v. *Rawſe*, 8 *Term Rep.* 455. And indeed the terms of the 38 *Geo.* 3. *c.* 1. *ſ.* 8. require that the affidavit ſhall ſtate that *no* offer has been made to pay in bank notes. But it may be obſerved that an adminiſtrator has no means of acquiring even a belief whether a tender was made to his inteſtate or not, which diſtinguiſhes his caſe from that of an aſſignee of a bankrupt.

(*b*) In *Oliver* v. *Ames*, 8 *Term Rep.* 364. though the Court of *K. B.* refuſed to diſcharge the defendant out of cuſtody on a ſimilar application, yet they ſuſpended the execution of a rule on the ſheriff to bring in the body, in order to give the defendant an opportunity of applying to the Court of Chancery.

HOSIER and Another Executors of HOSIER v. Lord ARUNDELL.

Feb. 1ſt.

DEBT on bond. The record ſtated that the Plaintiffs executors, *&c.* of *B. Hoſier*, *&c.* came into Court by *P. R.* their attorney, and exhibited their *certain bill* againſt the Defendant (having privilege of Parliament); the tenor of which bill followed in theſe words: "To the Juſtices of our Lord the King of the Bench, *London*, to wit, *John Hoſier* and *George Ford*, executors, *&c.* by *P. R. &c.* complain of *Henry* Lord *Arundell* having privilege of Parliament of a plea that he render to the ſaid *John* and *George*, *as executors* as aforeſaid, 364 *l.* of lawful money, *&c.*

An executor cannot join a count upon a bond given to his teſtator and a count upon a bond given to himſelf *as executor* in the ſame action. If a peer be ſued by bill no objection can be taken to ſuch proceeding except by plea in abatement. *Quære*, Whether even in that caſe ſuch an objection could prevail?

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which he *detains*, and the ſum of 189*l.* of like lawful money, which *he owes to and detains* from them, *&c.*" The firſt count then proceeded as uſual as upon a bond for 364*l.* entered into by the Defendant to the Plaintiffs' teſtator, and the ſecond count as on a bond for 189*l.* by the Defendant "to the ſaid *John* and *George* as ſuch executors as aforeſaid;" and a breach was aſſigned to both counts alleging non-payment of the 364*l.* to the teſtator in his lifetime, and alſo non-payment "of the ſame or the ſaid ſum of 189*l.* or either of them, or any part thereof to the ſaid *John* and *George* executors as aforeſaid, or either of them ſince the deceaſe of the teſtator." Then followed a *profert* of the bonds, and alſo of the letters teſtamentary, and the declaration concluded by praying his Majeſty's proceſs to be made to the Plaintiffs as executors againſt the Defendant according to the form of the ſtatute.

The Defendant craved oyer of the bonds and conditions, which being ſet forth, the firſt appeared as ſtated in the declaration to be a bond for 364*l.* by the Defendant to the Plaintiffs' teſtator, with a condition that it ſhould be void on payment of 182*l.* on a certain day, and the ſecond a bond by the Defendant to the Plaintiffs, executors of *B. H.* in 189*l.* to be paid to the Plaintiffs, "or their certain attorney, executors, adminiſtrators, or aſſigns," with a condition that it ſhould be void on payment of 94*l.* 10*s.* on a certain day. The Defendant then demurred ſpecially and aſſigned for cauſes, "that the ſaid Plaintiffs have in and by the ſaid declaration claimed part of the ſaid ſum of money therein demanded, as money which the ſaid Lord owes to and detains from them, and other part thereof as money which he is not alleged to owe to, but only to detain from them, thereby declaring againſt the ſaid Lord as well in the *debet* as in the *debet* and *detinet*, whereas the ſaid Plaintiffs ought to have declared in the *debet* only, or in the *detinet* only: And alſo for that the ſaid Plaintiffs have attempted to join in their ſaid declaration, and to include in one action two cauſes of action, which by the laws of this land cannot be joined in one declaration or included in one action. And alſo for that the ſaid writing obligatory firſt above mentioned appears to have been made and executed to the ſaid *B. H.* (the teſtator) in his lifetime; and the ſaid writing obligatory, ſecondly above mentioned, appears to have been made and executed to the ſaid Plaintiffs themſelves; and alſo for that the ſaid Lord can-

not plead one plea or uſe one defence againſt the ſaid action; and alſo for that the ſaid plaintiffs have attempted to proceed againſt the ſaid Lord being a Peer of this realm by bill, whereas they could not by law proceed againſt him by bill, but only by original writ: And alſo for that the ſaid declaration is in divers other reſpects repugnant, inſufficient, and informal.

The Plaintiffs joined in demurrer.

Lens Serjt. in ſupport of the demurrer was proceeding to ſtate the points of the caſe, when he was interrupted by the Court, who expreſſed a wiſh to hear the other ſide, at the ſame time obſerving, that they thought the objection to the Defendant being ſued by bill could not be taken advantage of in this ſtage of the proceedings after a full defence made by the words "comes and defends (*a*) the wrong and injury when, *&c.*" but ought to have been raiſed by a plea in abatement (*b*).

Shepherd Serjt. *contrà* contended, that the rule eſtabliſhed by the caſes was that an executor could not be ſued in the ſame action for a debt owing from his teſtator, and a debt owing from himſelf, on account of the different judgments which would follow, *viz.* a judgment *de bonis teſtatoris*, and a judgment *de bonis propriis*; and inſiſted, that though he cannot ſue on two ſuch cauſes of action in the ſame declaration, where in either caſe the fruits of the action would not be aſſets, yet that where they would both, as in this caſe, produce aſſets to the eſtate, a debt due

(*a*) Although in *Wilkes* v. *Williams*, 8 *Term Rep.* 631. the Court of *King's Bench* on the authority of *Alexander* v. *Mawman*, *Willes*. 40. held the words *defendit vim et injuriam quando*, *&c.* to amount only to an half defence, yet in that caſe they were prefixed to a plea in abatement, and the principle upon which the Court proceeded was that the *et cætera* ſhould be held to imply an half defence only in caſes where ſuch a defence ought to be made, or to imply a full defence where a full defence was neceſſary. In this caſe the defendant having demurred to the declaration a full defence was neceſſary.

(*b*) See *Lord Lonſdale* v. *Littledale*, 2 *H. Bl.* 267. 299. where it was reſolved by the Houſe of Lords that no objection could be taken to a proceeding by bill in *K. B.* againſt a peer except by plea in abatement. See to this point 2 *H. Bl.* 272. note (*a*) referring to 7 *H.* 6. 41. But Lord Ch. J. *Eyre* there intimated the opinion of the Judges, that upon ſuch a plea the objection might probably prevail, notwithſtanding the caſes of *Say* v. *Lord Byron*, *Sayer* 63. and *Goſling* v. *Lord Weymouth*, *Cowp.* 844. where the contrary had been ruled. In *Dawkins* v. *Burridge*, 2 Lord *Raym.* 1442. 2 *Str.* 734. *S. C.* it was determined that under the Stat. 12 & 13 *W.* 3. *c.* 3. *ſ.* 2. the Common Pleas might hold plea by original bill againſt a member of the Houſe of Commons, though that Court had no power to proceed by original bill at common law. But the Stat. of *W.* 3. does not empower any court to proceed by original bill againſt Peers or Lords of Parliament. See the argument of Mr. Serjt. *Williams* in *Lord Lonſdale* v. *Littledale*, 2 *H. Bl.* 273, 274. and the firſt reaſon aſſigned in ſupport of the errors in the Houſe of Lords, *S. C.* 2 *H. Bl.* 299, 300, 301.

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to the executor and a debt due to the teſtator might be joined, and for this he cited *King* and others executors of *Stevenſon* v. *Thom*, 1 *Term Rep.* 487. where the firſt count of a declaration, in an action againſt the acceptor of a bill of exchange indorſed by the payee to the Plaintiffs, who were the ſurviving executors of *Stevenſon*, " in right of the Plaintiffs as ſurviving executors as aforeſaid," joined with two other counts, the one for money had and received to the uſe of the Plaintiffs as executors, and the other on an account ſtated with the Plaintiffs as executors, was holden good on demurrer: he obſerved that in that caſe the argument in ſupport of the demurrer had proceeded on the ground of the promiſe being improperly laid, the indorſement to them as executors not being a good conſideration for an aſſumpſit to them as executors, but for an aſſumpſit to them in their own right, and yet *Aſhurſt* J. ſaid they held the bill as executors, and might declare upon the right in which they held it; and *Buller* J. obſerved, that though a Plaintiff cannot join two counts, one on a debt due to himſelf, and another to him in the character of executor, yet that the only queſtion was whether the ſum when recovered would be conſidered as aſſets of the teſtator.

Lord ALVANLEY Ch. J. Admitting that where the fruits of a judgment go altogether as aſſets into the Plaintiff's hands, two cauſes of action may be joined, *viz.* one to the executor ſtrictly as executor, and the other on a promiſe made to him after the death of his teſtator, ſtill in this caſe if the preſent Plaintiffs happen to die inteſtate before the debt due on the bond entered into with them in their own name is recovered, it cannot be contended that the adminiſtrator *de bonis non* will be able to put that bond in ſuit. In ſuch caſe the adminiſtrator of the eſtate of the ſurviving executor would be the perſon on whom the right of action ariſing out of the bond would unqueſtionably devolve. The Plaintiffs are deſcribed in the bond to be the executors of *Benjamin Hoſier*, and the money is to be paid to them " their certain attorney, executors, adminiſtrators, or aſſigns." There is indeed another reaſon why this declaration ſhould not be ſupported, *viz.* that the coſts cannot be ſevered, and that the Plaintiffs for the cauſe of action ſtated in the ſecond count would be liable to pay coſts, whereas for that ſtated in the firſt they would not be liable, becauſe ſuing ſtrictly as executors. If it were otherwiſe the Plaintiffs' right as executors to retain might be affected; for the right to retain

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accrued to them on taking this bond, which was *quoad* the teſtator's debt a payment; but if the bond could be put in ſuit by the adminiſtrator *de bonis non* of *Benjamin Hoſier*'s eſtate, their repreſentative would be deprived of his right to retain.

Rooke J. Where executors change the nature of the debt due to their teſtator after their teſtator's death, they muſt ſue for the new debt in their own name, and not in their character of executors. If theſe Plaintiffs had failed they would not have been liable to coſts on the firſt count, but on the ſecond they would, becauſe in the one they ſue as executors of the obligee of a bond, in the other as obligees themſelves of a bond. Indeed this caſe falls within the words uſed by Mr. Juſtice *Buller* in *King* v. *Thom*, "it is clear that a Plaintiff cannot join two counts, one on a debt to himſelf, and another to him in the character of executor." To the ſecond count of this declaration it is quite clear that the defendant could not have pleaded that the Plaintiffs were not executors.

Chambre J. If executors take a note or bond from a creditor to the eſtate of their teſtator, the old debt is thereby extinguiſhed, and a new one created, which muſt be declared upon as ſuch. The caſe of *Betts* v. *Mitchell*, 10 *Mod.* 315. is in point. There the Plaintiff declared upon ſeveral promiſes made to his teſtator, and alſo on a promiſſory note to himſelf *ut executori*; and it was inſiſted, that the laſt count could not be joined with the former ones, the words *ut executori* being only a deſcription of the Plaintiff's perſon, whereas the note was made to him, and tranſferable by his indorſement, and would go to his adminiſtrator, and not to the adminiſtrator *de bonis non*; and this reaſoning was adopted by the Court, who gave judgment for the Defendant on demurrer to the declaration. There is alſo a caſe of *Rogers* v. *Cook*, 1 *Salk.* 10. where the reaſon given why a cauſe of action in the teſtator's time, and a cauſe of action in the executor's time, cannot be joined, is that the coſts are entire and cannot be ſevered. The debt created by the ſecond bond is a debt to the Plaintiffs themſelves, and will devolve on their repreſentative, though whatever they recover they muſt hold as truſtees for the eſtate of their teſtator.

Shepherd then applied for leave to amend.

But *The Court* ſaid this was not a caſe in which they ought to depart from the general rule, that after argument amendments are

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not allowed, particularly as the record would ſtill be open to the objection of its being a proceeding againſt a Peer by bill (*a*); and indeed in caſe of amendment the declaration would be as a declaration *de novo*, and conſequently the defendant at liberty to plead in abatement to the juriſdiction.

Judgment for the Defendant.

(*a*) Mr. Juſtice *Chambre* obſerved that in *Hargrave's* Law Tracts (ſee diſcourſe by Sir *Matthew Hale* concerning the Courts of *King's Bench* and *Common Pleas*, c. 5. p. 363.) ſeveral precedents of proceeding by original bill are mentioned of a date as early as *Edward* 3d. To this obſervation it may be added that upon inveſtigation two of thoſe inſtances turn out to be proceedings by original bill in the Court of *Common Pleas*. See *T.* 31. *Ed.* 3. *Fitzh. Ab. Bill.* 11. and 30 *Aſs.* pl. 14. *Bro. Abr.* pl. 20. From the inſtances collected in the above chapter Sir *Matthew Hale* infers that the Court of *King's Bench* formerly took cognizance by original bill of all matters whereof it could take cognizance by original writ. But it may be obſerved that many of the caſes appear to have been contempts of the Court, ſuch as obſtructing the perſon of a Defendant in his way to make his defence to an action then pending; in which caſe either Court may take cognizance of the matter by bill, even though it ariſe in a foreign county; for, ſays *Skipwith*, *T.* 31. *Ed.* 3. *Fitzh. Ab. Bill.* 12. "when a party is here pleading he is in the protection of the law," and on the ſame principle 42 *Aſſ.* pl. 28. a man was ſued by bill for beating a woman in *curiâ regis*, and another in 22 *H.* 6. 24. for maintenance in the preſence of the Court. Indeed 42 *Aſſ.* 11. alſo cited by Sir *Matthew Hale*, appears to be incorrectly cited, for the Court there held that bill for an eſcape againſt an officer could not be maintained. So 17 *Aſſ.* 5. was an appeal of robbery. The remaining precedents are too indiſtinctly reported to afford any ſatisfactory concluſion whether or not they were proceedings by bill in caſes of contempt or privilege, or under what circumſtances. This at leaſt is remarkable, that early in the enſuing reign, ſee *Fitz. Ab. Bill* 9. *M.* 1. *R.* 2., a queſtion aroſe whether under the circumſtances of the caſe a party was ſufficiently in *cuſtodiâ mareſcalli* to be proceeded againſt by bill; which diſcuſſion ſeems to have been unneceſſary if the party whether in *cuſtodiâ* or not might ſtill be proceeded againſt by original bill. And ſimilar queſtions appear to have ariſen in 7 *H.* 6. 41. 9 *Ed.* 4. 2. and 9 *Ed.* 4. 12. To this it may be added, that it has been ſaid if a man be in the Fleet, a Plaintiff may have a bill of debt againſt him, in the ſame manner as he can in the *King's Bench* againſt a man in the cuſtody of the Marſhal. *Fitz. Ab. Bill* 18. 3 *H.* 6. 26.; though *Fitzherbert* adds that it was not uſual.

Feb. 2d.

Talmash *v.* Penner.

After plea pleaded the venue cannot be changed. But if the Defendant plead pending a rule *Niſi* for changing the venue, the Court will notwithſtanding allow him to change the venue.

The Defendant in an action of aſſauſt and battery having obtained a rule *Niſi* for changing the venue from *London* to *Surry*, afterwards pleaded the general iſſue.

Shepherd Serjt. in ſhewing cauſe againſt the rule inſiſted, that the Defendant by pleading to the declaration in *London* had waved

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his right to change the venue, and referred to a case of *Lee* v. *Williams*, *Mich.* 1800, in this Court as in point.

Lens Serjt. *contrà* admitted, that if the Defendant had obtained time to plead upon the terms of taking ſhort notice of trial for *London* or *Middleſex*, he would thereby have waved his right to change the venue (*a*), but inſiſted that the Defendant had waved nothing by pleading in the regular way, ſince his act could not be conſidered as voluntary; for if he had omitted ſo to do, the plaintiff would have been entitled to ſign judgment.

The Court ſaid, that ſtrictly ſpeaking the defendant had waved his right; for by pleading the general iſſue he had put himſelf upon the country, that is a jury of the county in which the action was brought, *viz.* of the city of *London* (*b*); but that as it appeared clearly from the plea having been put in pending the rule for changing the venue, that the defendant muſt have ſo pleaded from inadvertence, they would allow the venue to be changed, and the plea to be amended by altering the name of the county, upon payment of coſts; and they cited a caſe of *Herbert* v. *Flower*, *Barnes* 492. *Ed.* 3. where the ſame indulgence was granted upon the ſame grounds.

(*a*) See *Tidd. Pr.* 364. ed. 1. 528. ed. 2. and *Shipley* v. *Cooper*, 7 *Term Rep.* 698.

(*b*) Indeed the venue cannot be changed at the inſtance of the defendant after plea pleaded, even though he afterwards obtain leave to withdraw his plea and plead it *de novo* with a notice of ſet-off, *Palmer* v. *Turner*, *H.* 26 *Geo.* 3. *Tidd. Pr.* 364. ed. 1. 528. ed. 2.

ABBOTT v. RAWLEY.

Feb. 3d.

If proceedings be commenced upon a recognizance of bail immediately upon the return of the *ca. ſa.*, the Court will not ſtay them but upon payment of the coſts, though the principal be ſurrendered within the four days allowed by the practice of the Court.

THIS was an application to ſtay proceedings, in an action againſt bail on the recognizance, on payment of the debt and coſts, the Defendant in the original action having been rendered within the four days allowed by the practice of the Court, but after the return day of the *ca. ſa.*, and the Plaintiff having commenced his proceedings againſt the bail immediately after the return day.

Onſlow Serjt. oppoſed the rule being made abſolute, unleſs upon payment of the coſts incurred in the action againſt the bail, and cited *Perigale* v. *Melliſh*, 5 *Term Rep.* 363. in which the Court of *King's Bench* refuſed to ſtay proceedings againſt the bail upon payment of debt and coſts in the original action, unleſs the Defendant would

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would also pay the costs in the action against the bail, though the latter action was commenced within the eight days allowed by the practice of the Court for the bail to surrender the principal. He observed that there was a distinction between suing by *scire facias*, and bringing an action on the recognizance, no costs being allowed in the former case unless the bail appear and plead or join in demurrer (*a*), whereas in the latter they are allowed.

Shepherd Serjt. *contrà* insisted, that as the bail had surrendered within the time allowed by the practice of the Court, they were perfectly regular, and ought not to be called upon to pay the costs of the action in the recognizance; that in fact both parties were regular, the Plaintiff having a right to commence proceedings on the recognizance upon the body not being brought in at the return day, and the bail having a right to surrender the principal within the four days after.

The Court said, that though the render within the four days was *ex gratiâ*, still it must be admitted that the Plaintiff had a right to bring his action on the recognizance of bail, and consequently the bail had no right to stay the proceedings in that action without paying the costs.

Rule absolute on payment of the costs of the action on the recognizance, as well as of the debt and costs in the original action.

(*a*) 2 *Tidd. Pr. K. B.* 1018. ed. 2.

Feb. 5th.

STRONG *v.* SIMPSON.

In an action for breach of a contract to deliver goods at a certain price *per* ton, the Court will not allow the Defendant to pay money into Court.

THIS was an action of assumpsit in which the declaration stated, that in consideration that the Plaintiff had bought of the Defendant a certain quantity of potatoes at a certain price *per* ton, the Defendant undertook to deliver the potatoes at the price aforesaid, and that the Defendant had neglected so to do, whereby the Plaintiff had been injured. The Defendant paid money into Court, upon which a rule *Nisi* was obtained for discharging the rule to pay money into Court.

Best Serjt. shewed cause and contended, that the Court sometimes allowed money to be paid in, though the damages were not liquidated, as in *Hutton* v. *Bolton*, 1 *H. Bl.* 299. *in notis*, and *Yate* v. *Willan*,

Willan, 2 *East*. 128. which were actions againſt common carriers, and alſo in actions upon policies of inſurance where the damages are altogether unaſcertained.

Shepherd Serjt. *contrà* inſiſted, that money can never be paid into Court but where the damages are mere matter of computation, as was laid down by Lord *Mansfield* in 2 *Burr.* 1120.; therefore it had been diſallowed in actions for dilapidations, *Squire* v. *Archer*, 2 *Str.* 906. and *Salt* v. *Salt*, 8 *Term. Rep.* 47. and that in *Griffith* v. *Williams*, 1 *Term. Rep.* 710. which was an action againſt an attorney for neglecting to enter up judgment on a warrant of attorney, the Court thought that the payment of money into Court was originally irregular, though as the Plaintiff had taken it out he was precluded from objecting to the irregularity; that with reſpect to *Yate* v. *Willan* the only queſtion there made related to the effect of the payment in admitting the contract; and that the diſtinction reſpecting actions againſt carriers is this, that if there be an agreement to be liable to a ſpecific ſum that ſum may be paid into Court, but not otherwiſe, as was ſettled in *Fail* v. *Pickford*, *ante*, vol. 2. p. 234. where the Court refuſed to allow a carrier to pay into Court the invoice price of goods loſt, there being no agreement that the carrier ſhould be liable to that extent.

The Court ſaid that money could not be paid into Court in ſuch a caſe as this without violating every rule of practice upon the ſubject: that the value of the goods was not the criterion of the Plaintiff's damage, but that the declaration ſought a compenſation for the breach of a ſpecific agreement, and that money might as well be paid into Court in an action for a breach of a promiſe of marriage.

And CHAMBRE J. added that he doubted much of the propriety of extending the rule reſpecting the payment of money into Court, ſince it transfers the riſk of the coſts from the party who is originally to blame, to the party who is not to blame.

Per Curiam, Rule abſolute.

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Feb. 5th.

LARKINS and Others *v.* LARKINS and Others.

If a teſtator having executed a deviſe of lands in the preſence of three witneſſes to two perſons as joint tenants in fee, afterwards ſtrike out the name of one of the deviſees and there be no re-publication, the eraſure will only operate as a revocation of the will *pro tanto*.

THE following caſe was ſent by the Maſter of the Rolls for the opinion of this Court.

William Larkins Eſquire deceaſed, by his laſt will and teſtament bearing date the 3d day of *July* 1794, duly executed and atteſted in the preſence of three witneſſes, and as by law is required for deviſing freehold lands (amongſt other things) gave and deviſed as follows: "I give, deviſe, and bequeath all my freehold meſſuages or tenements and hereditaments ſituate at *Calcutta* (*a*) aforeſaid, with all and every the rights members and appurtenances thereto belonging unto my brother *John Paſcall Larkins*, and to my good friend *Samuel Enderby the younger* of *Aldermanbury* in the city of *London*, Eſquire, and *George Smith of Lincoln's Inn, in the county of Middleſex Eſquire*, their heirs and aſſigns upon truſt, that they or the ſurvivor of them, or the heirs or aſſigns of ſuch ſurvivor do and ſhall ſo ſoon after my death as conveniently may be ſell and diſpoſe of my ſaid freehold meſſuages and hereditaments at *Calcutta* aforeſaid, either together or in parcels, by public auction or private contract, and for ſuch ſum and ſums of money and in ſuch manner as they my ſaid truſtees or the ſurvivors or ſurvivor of them, or the heirs or aſſigns of ſuch ſurvivor ſhall think proper and moſt advantageous: And my will is and I do hereby declare and direct that upon every or any ſuch ſale or ſales the receipt or receipts of my ſaid truſtees or the ſurvivor or ſurvivors or the heirs or aſſigns of ſuch ſurvivor ſhall be a good and ſufficient diſcharge or good and ſufficient diſcharges to the purchaſer or reſpective purchaſers of my ſaid freehold meſſuages or hereditaments or any part thereof for his, her, or their purchaſe money or reſpective purchaſe money, or ſo much and ſuch part thereof as in ſuch receipt or receipts ſhall be expreſſed to be received, and that ſuch purchaſer or purchaſers or any or either of them ſhall not be obliged to ſee to the application of his, her, or their purchaſe money, nor ſhall they or any or either of them be

(*a*) On the ſuggeſtion of Lord *Alvanley* Ch. J. "*Middleſex*" was by conſent ſubſtituted for "*Calcutta*" wherever it occurred in the caſe, his Lordſhip obſerving that poſſibly the ſtatute of frauds might not extend to our *Indian* poſſeſſions, and that there might be ſome *lex loci* of which the Court were ignorant.

anſwerable or accountable for the miſapplication or nonapplication thereof or of any part thereof: And my will is, and I do hereby declare and direct, that the money to ariſe by ſale of my ſaid freehold meſſuages and hereditaments at *Calcutta* aforeſaid, after payment of the charges and expences attending ſuch ſale, and alſo the rents iſſues and profits thereof until the ſame ſhall be ſo ſold, ſhall be deemed and conſidered as part of the reſidue of my eſtate and effects, and go therewith as hereafter directed." And the teſtator, after giving divers annuities and bequeſts, then gave the reſt and reſidue of his eſtate and effects whatſoever and whereſoever, whether real or perſonal, unto the ſaid *John Paſcall Larkins*, *Samuel Enderby the younger*, *and George Smith*, their heirs, executors, adminiſtrators, and aſſigns for ever, upon certain truſts in the will ſet forth. And concluded thus: "And laſtly, I do hereby nominate and appoint my ſaid brother *John Paſcall Larkins* and the ſaid *Samuel Enderby the younger and George Smith*, together with the ſaid *Mary Ann Larkins* my ſaid brother's wife, and the ſaid *Mary Cuming and Henrietta Sampſon*, guardians of my ſaid daughters during their reſpective minorities: And I do hereby alſo nominate and appoint my ſaid brother *John Paſcall Larkins*, the ſaid *Samuel Enderby the younger*, *and George Smith* executors of this my laſt will and teſtament.

The teſtator had no other real eſtate, than the meſſuage and hereditaments at *Calcutta* in the will mentioned, and the deviſes above ſet forth are all that the ſaid will contains relating to land, the other parts of the will relating merely to perſonal eſtate.

After the teſtator had duly executed the ſaid will, he with his own hands ſtruck out by drawing a pen through them the ſeveral words and paſſages hereinafter mentioned (that is to ſay), in the deviſe of the freehold meſſuages at *Calcutta* to the ſaid *John Paſcall Larkins*, *Samuel Enderby* the younger of *Aldermanbury*, in the city of *London*, Eſquire, and *George Smith* of *Lincoln*'s Inn, in the county of *Middleſex*, Eſquire, the words "the younger" and "*George Smith* of *Lincoln*'s Inn in the county of *Middleſex* Eſquire," were ſtruck out by a pen drawn through them. And in the ſaid bequeſt of the reſt and reſidue of the real and perſonal eſtate to the ſaid *John Paſcall Larkins*, *Samuel Enderby* the younger, and *George Smith*, the following words, "the younger" and "*George Smith*, their heirs, ex," were ſtruck out, but over the words "heirs, ex" was written the word "*ſlet.*" And in the clauſe appointing guardians the following words, that

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is to ſay, "the younger," and "*George Smith*," and the words "*Henrietta Sampſon*," were ſtruck out. And in the laſt clauſe appointing executors, the following words, *viz.* "the younger," and "*George Smith*," were alſo ſtruck out; and all the above alterations were made by the teſtator himſelf, by drawing the pen through the above words. Other parts of the ſaid will were alſo altered in the ſame manner by ſtriking out different paſſages thereof, but ſuch alterations relate only to the teſtator's perſonal eſtate. The ſaid teſtator never in any manner re-executed, or republiſhed his ſaid will after making the above mentioned alterations. At the time when the ſaid will was executed, the ſaid *George Smith the younger* had a father living, *George Smith the elder*, who died before the time when the above mentioned alterations were made.

The queſtion for the opinion of the Court was, Whether the deviſe of the eſtate at *Calcutta* to the truſtees named in the ſaid teſtator's will to be ſold, were revoked by the teſtator's having ſtruck out the name of *George Smith*, one of ſuch truſtees, after the execution of his ſaid will?

Beſt Serjt. for the Plaintiffs. The queſtion to be conſidered is, Whether by ſtriking out the name of *George Smith*, one of the truſtees, the teſtator revoked the deviſe of his lands in *Calcutta* altogether, or whether he only revoked it *pro tanto*? That the intention of the teſtator was merely to revoke the truſt eſtate deviſed to *G. Smith* is moſt manifeſt, for in that part of the will where his pen had accidentally gone too far and eraſed the word "heirs" and the two firſt letters of the word "executors," which were to enlarge the eſtate of the two other truſtees, he wrote over the eraſure "*ſtet*," thereby plainly expreſſing his intent that they ſhould retain the eſtate he had given them before the eraſure took place. In *Sutton* v. *Sutton*, *Cowp.* 812. where the teſtator after deviſing all his lands upon truſt to ſell, "except the houſe at *Bath*," gave to his wife "his houſe in *Bath* for her life and after her death to his eldeſt ſon," and after the execution of the will ſold his houſe at *Bath*, and ſtruck out of his will the exception and the deviſe reſpecting it, the deviſe to the truſtees was nevertheleſs held not to be revoked. There were ſeveral other alterations and obliterations in that will, eſpecially one whereby in the declaration of the truſts the teſtator altered an annuity of 50*l.* to his wife to 450*l.*; but the Court of *King's Bench* avoided giving any opinion reſpecting the diſtribution of the funds ariſing from the eſtates when ſold, only deciding that the deviſe to ſell remained in force. A

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revocation effected by erasure or alteration can be extended no further than it appears to be the intention of the testator that it should operate. The statute of frauds 29 *Car.* 2. *c.* 3. *s.* 6. enacts, that no devise in writing of lands, &c. nor any clause thereof shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself or in his presence, and by his direction and consent. The object of this provision was that where a testator has expressed a clear intention by writing, that intention should not be superseded by any thing but a clear act of the testator manifesting an intention to revoke. The act therefore must appear to be done *animo revocandi:* and the effect of the act can extend no further than such an intention appears. If it were otherwise all that mischief would arise which the act was intended to prevent. In *Humphreys* v. *Taylor*, *H.* 25 *Geo.* 2. *in Canc.* 5 *Bac. Abr.* tit. *Wills and Testaments*, *G.* p. 535. *fol.* ed. it was decided that "if *A.* by his will devise all the residue of his personal estate to *B.* and *C.* and make them executors, and after by a codicil cancel and revoke every legacy, thing, and part relating to *B.*, and revoke his being executor, *C.* shall have the whole; for a revocation without a new gift shall have the same effect as if it had been expressly given: and whether it be by codicil or obliteration it is the same." In *Lamb* v. *Parker*, 2 *Vern.* 496. Lord Keeper *Wright* says, the rule where a subsequent act shall amount to a revocation by implication, is, that such implication must be necessary and wholly inconsistent. So in *Com. Dig.* tit. *Devise*, F. 2. it is laid down, that a revocation of that part of a will by which two out of four trustees are named, and an appointment of two new trustees only amounts to a revocation of the two trustees and constitutes two others in their stead. The case of *Hyde* v. *Mason*, 5 *Bac. Abr.* tit. *Wills and Test*, *G.* p. 540. *Vin. Abr.* tit. *Devise*, *R.* 2. pl. 17. is also a very strong authority to shew that obliteration unless done *animo revocandi* will not amount to a revocation of the will. The testator in that case having executed two duplicate wills and delivered one to his executor, afterwards made great alterations in that which he retained, and wrote out a fair copy including the alterations, which he never executed; and it was held that the alterations did not amount to a revocation of his will, but only shewed an intention to make another, which intention never having been carried into effect the will remained in force.

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Shepherd Serjt. *contrà*. Particular modes of revoking a will of lands or any clauſe thereof having been pointed out by the ſtatute of frauds, the Court cannot inquire what was the intention of the teſtator in obliterating certain parts of his will, unleſs he has purſued the directions of the ſtatute. Now by the ſtatute two ſorts of revocation are allowed; firſt, a revocation by the mere act of the party without any witneſſes, as tearing, cancelling, or obliterating; and ſecondly by executing a new will in the preſence of three witneſſes, inconſiſtent with the bequeſts of the former will. Now the revocation in the preſent caſe, if good, will in effect operate as a new deviſe, and yet the new deviſe will not have been executed according to the proviſions of the ſtatute. It is true, that if this were a deviſe of perſonalty it would be different; for in that caſe no atteſtation is neceſſary, any writing which amounts to evidence of a new gift being ſufficient to paſs that ſpecies of eſtate. In the caſe therefore of *Humphreys* v. *Taylor* the deviſe being of perſonalty the deciſion is no authority in the preſent inſtance. With reſpect to *Hyde* v. *Maſon* the Court did not decide that the deviſees took as under a new bequeſt, but only that the deviſor having an intention to revoke had not carried that intention into execution, and therefore they decreed in favour of the duplicate which had not been obliterated, without engrafting upon it any of the intended alterations. In the caſe cited from *Com. Dig.* it does not appear whether the will ſubſequent to the revocation of two truſtees, and appointment of two new truſtees, were re-executed according to the ſtatute of frauds or not: conſequently it cannot be inferred from thence that merely ſtriking out the name of one of three truſtees without a new execution of the will is only a revocation *pro tanto*; for if the will ſubſequent to the revocation and appointment were re-executed according to the ſtatute of frauds, moſt clearly the old will was from that moment annulled, and a new one created. If indeed there be two diſtinct deviſes to different perſons in one will, and the teſtator afterwards revoke one of them, it is not contended that it would alſo revoke the other: ſuch deviſes being as entirely independent of each other as two different wills (*a*). But if a man deviſe the ſame eſtate to two perſons, and afterwards revoke that deviſe as to one, ſuch revocation neceſſarily alters the eſtate of the other

(*a*) See *Bamlitt* v. *Burkitt*, 2 *Vern.* 498. where an erazure of certain ſentences in a will was held not to affect the deviſe of a copyhold eſtate to the teſtator's wife.

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by enlarging it, and if it can operate at all muſt operate as a new gift. Whatever alters either the quantity or quality of the eſtate of the deviſee muſt be conſidered as a new deviſe: as if the teſtator after giving by his will an eſtate to *A.* his heirs and aſſigns, ſhould afterwards ſtrike out the words "heirs and aſſigns" *A.* could not take an eſtate for life unleſs the will were re-executed. It is alſo material to attend to the language of the ſtatute of frauds, which ſpeaks of the revocation of a will or any *clauſe* thereof, not of any part thereof: from which it may be inferred that a revocation muſt either be of the whole will or of ſome clauſe thereof: and that if any thing be done by the teſtator amounting to a revocation of any part of a will, it cannot operate upon leſs than upon the whole clauſe to which it relates. As to the caſe of *Sutton* v. *Sutton* it cannot affect this: for the teſtator, in that caſe in fact revoked nothing. Having deviſed all his lands to truſtees except his houſe at *Bath*, which he deviſed to his wife, he afterwards ſold his houſe at *Bath*, and then ſtruck the exception and deviſe to his wife out of his will: but the intereſt of the deviſee was not affected, nor was the operation of the remainder of the clauſe in any degree altered by that act.

Lord ALVANLEY Ch. J. I have no doubt upon this caſe. A revocation by obliteration will have the ſame effect which a revocation by any other means will have, and no more. I lay out of the caſe the conſideration of the deviſees being truſtees, for in a court of law they muſt be conſidered as joint tenants in fee abſolutely. Now it is argued, that the revocation of the deviſe as to one deviſee makes an alteration in the intereſt of the others. But whatever this alteration be it is not an alteration ariſing from a new gift, but merely from a revocation. If the remaining deviſees were to acquire any eſtate which they had not before, ſomething beyond a mere revocation would be neceſſary. If therefore the deviſees had been tenants in common, upon the eraſure of one name the remaining two would take no more than two thirds of the eſtate.

ROOKE J. It is rather extraordinary that this point ſhould now come to be decided for the firſt time; but though the point be new I entertain no doubt that the eraſure of the name of *George Smith* is to be conſidered as a revocation of the deviſe *pro tanto* only.

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CHAMBRE J. It would be moſt unreaſonable to defeat the intention of a teſtator ſo plainly expreſſed as it is in the preſent caſe; and before we could come to ſuch a deciſion I ſhould expect authorities to be cited previous to the ſtatute of frauds. For the revocations enumerated in the ſtatute were revocations at common law, and ſtand upon the ſame footing as if that ſtatute had never paſſed, it being declared that the reſtrictions introduced by that ſtatute ſhould not extend to thoſe revocations. The only argument of any weight which has been uſed is, that the remaining deviſees take a larger intereſt. But that argument does not apply here; for the deviſees being joint tenants are ſeized *per my et per tout*; and if one joint tenant die in the life of the teſtator the other joint tenant takes the whole of the eſtate, though it never veſted in him during the life of the teſtator, the reaſon of which is that the original deviſe is ſufficient to paſs the whole intereſt. The caſe of a tenant in common is indeed different, he being only ſeiſed of an undivided moiety. The effect of this act of obliteration, as it appears to me, is to take away that from *G. Smith* which the teſtator at firſt intended to give him. I cannot entertain a doubt upon the ſubject; and indeed the authorities cited are all one way (*a*).

(*a*) The certificate was not prepared when this caſe was printed.

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DOE ex dim. WALKER *v.* STEVENSON.

Ejectment in *C. B* and verdict for the Plaintiff and coſts paid by Defendant, who then brought an ejectment in *K. B.* for the ſame premiſes and recovered, but was not paid his coſts; and now a third ejectment being commenced here, by the Plaintiff in the firſt ejectment, the Court ſtayed proceedings till payment of the coſts of the ſecond ejectment in *K. B.*

THIS was an application to ſtay proceedings in an action of ejectment, until the coſts of a former ejectment were paid.

It appeared that the leſſor of the Plaintiff had brought a former ejectment in this Court, upon which he had recovered and received the coſts; that the Defendant then brought another ejectment in the *King's Bench* and recovered, but had not received the coſts; after which the leſſor of the Plaintiff brought this third ejectment.

Shepherd Serjt. reſiſted the application, and inſiſted, that although the Court will not ſuffer a perſon who has failed once as leſſor of the Plaintiff to bring a ſecond ejectment without paying the coſts of the ſuit, yet that the rule did not apply to a ſecond

ejectment brought by a perſon who had before failed as a defendant, and who therefore is not to be conſidered as twice making himſelf an actor. 1802. Doe ex dim. WALKER v. STEVENSON.

Vaughan Serjt. in ſupport of the application ſaid, that the point had already been decided in *Thruſtout d. Williams* v. *Holdfaſt*, 6 *Term. Rep.* 223.

The Court thought that the principle of the rule extended as well to caſes where a perſon improperly defends an ejectment, as where he improperly brings one, and therefore made

The rule abſolute (*a*).

(*a*) The practice of the Courts of *King's Bench* and *Common Pleas* as to ſtaying proceedings in actions of ejectment till payment of the coſts of a former ejectment on the ſame title correſponds. See the caſes collected *Hullock*'s Law of Coſts from p. 445. to 467. And indeed where the ſame title is in iſſue, the above practice prevails though the ejectment be for different lands in a different county, and a new Defendant be added. *Kane d. Angel* v. *Angel* and Another, 6 *Term Rep.* 740. and though the former ejectment was brought by the father of the leſſor of the Plaintiff againſt the father of the Defendant. *Doe d. Feldon* v. *Roe*, 3 *Term Rep.* 645. But the practice of the two Courts as to ſtaying proceedings in other actions by the ſame Plaintiff for the ſame cauſe, ſeems to differ thus far, that the Court of *K. B.* ſtays proceedings till the coſts of the former action are paid wherever the Plaintiff's proceedings appear to be vexatious, but the Court of *C. B.* never interferes unleſs the merits of the caſe have been tried in the former action. *See Waſton* v. *Withers*, 2 *Term Rep.* 511. *Moulton q. t.* v. *Bingham*, and *Baldwin* v. *Richards*, 2 *Term Rep.* 511 *n. a.* for the practice of *K. B.* and *Cox* v. *Chubb*, 2 *Bl.* 809. and *Cooke* v. *Dobree*, 1 *H. Bl.* 10. for the practice of *C. B.* Alſo *Hullock*'s Law of Coſts, p. 463. to 467.

MATTHIS and Others *v.* POTTS.

Feb. 6th.

THIS was an action on two policies of inſurance on goods at twenty guineas *per cent.* In one of the policies the riſk was deſcribed "at and from *Naſſau* to *Campeachy*, and at and from *Campeachy* to *Naſſau per* the ſhip or veſſel called *La Pura y Limpia*, or any other *Spaniſh* ſhip or ſhips;" and in the other, "*Per* the *Spaniſh* ſchooner *La Pura y Lympia* from *Naſſau* to *Campeachy* with a licence from the Governor of *Naſſau*, and back in the ſame ſhip *La Pura y Lympia*, or any other ſhip or ſhips."

Inſurance on goods on board a *Spaniſh* ſhip from *Naſſau* to *Campeachy* to continue on the goods till diſcharged and ſafely landed. The ſhip having a licence from the *Britiſh* Go-

vernor at *Naſſau* ſailed to *Campeachy*, and having arrived off that port made ſignals for launches to come out, into which the goods were put for the purpoſe of being run aſhore. In this ſituation the goods were ſeized by two *Spaniſh* Government brigs, it being contrary to the *Spaniſh* laws to import *Britiſh* goods into the *Spaniſh* main. It ſeems that the goods were protected by the policy while on board the launches, ſuch being the uſual method of carrying on that trade. But it was held that ſuch a loſs was not well deſcribed by an averment, ſtating that the goods were ſeized "in a forcible and hoſtile manner by certain perſons enemies of our Lord the King to the Plaintiff unknown."

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The riſk in both policies was deſcribed as uſual to endure upon the goods until the ſame ſhould be diſcharged and ſafely landed. In the count upon the firſt policy it was averred, that goods to the amount inſured were ſhipped on board the ſaid ſhip to be carried from *Naſſau* upon the voyage aforeſaid, "the ſaid ſhip or veſſel then and there being licenſed for that purpoſe;" and in the count upon the ſecond policy, "that the ſaid ſhip or veſſel was licenſed as in the ſaid policy of aſſurance mentioned." The loſs in both counts was ſtated in the ſame manner, *viz.* that before the ſaid goods were diſcharged or ſafely landed they were "in a forcible and hoſtile manner ſeized, captured, taken, and carried away by certain perſons then being at enmity and open war with our Lord the King to the Plaintiffs unknown."

At the trial before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after laſt *Michaelmas* Term, it was admitted that the *Spaniſh* veſſel *La Pura y Limpia* was duly licenſed for the voyage in queſtion by the Governor of the *Bahama* Iſlands purſuant to his Majeſty's inſtructions to the ſaid Governor, but that no licence was granted by the *Spaniſh* government or any other perſon on their behalf; that the ſaid veſſel was loaded with the goods mentioned in the declaration and bills of lading; that *La Pura y Lympia* ſailed on the voyage in queſtion from the *Bahama* Iſlands on the 21ſt *April* 1800; and on the 30th of the ſame month arrived at a port near *Campeachy*, and put the goods into a launch with a view of running them aſhore at *Campeachy* in the night, which goods were afterwards ſeized in their paſſage to *Campeachy* by two *Spaniſh* government brigs, the landing the ſame being illegal by the revenue laws of *Spain*, and were wholly loſt to the plaintiffs.

It was proved, that all *Spaniſh* veſſels laden with *Britiſh* merchandize trading to the *Spaniſh* main are by the *Spaniſh* laws liable to confiſcation; and that at *Campeachy* thoſe laws are enforced more ſtrictly than in other parts of the *Spaniſh* main; that the uſual method of carrying on this ſort of trade to *Campeachy* is for the veſſels to lie off the coaſt as near to the port of *Campeachy* as can be done with ſafety, and there to make ſignals for the launches to come off from ſhore; but that in ſome caſes the veſſels do venture to ſail directly into the port itſelf; and that the launch in which the goods in queſtion were at the time of the ſeizure had put off from ſhore in the manner above mentioned. His Lordſhip directed the jury, in caſe they ſhould be of opinion

that the trade was conducted in the preſent caſe in one of the uſual modes (*a*), to find a verdict for the Plaintiff, which they accordingly did.

Williams Serjt. on a former day obtained a rule to ſhew cauſe why this verdict ſhould not be ſet aſide and a new trial be had, firſt on the ground that the averment in the declaration that the goods were captured in a forcible and hoſtile manner by the King's enemies was not ſupported by the evidence, and ſecondly that as the licence of the *Britiſh* Governor at *Naſſau* was confined to the *Spaniſh* ſhip, the goods were not protected by the licence from *Britiſh* capture when on board the launch, and conſequently the riſk at that time was materially different from that inſured againſt.

When the caſe came on the Court ſeemed to think that the latter objection was not of any weight, but intimated a ſtrong opinion that the former objection muſt prevail, and recommended the Plaintiffs to conſent to a new trial, and in the mean time amend the declaration.

Shepherd and *Vaughan* Serjts. for the Plaintiffs, expreſſed their willingneſs to accede to this propoſal on payment of the coſts by the Defendant; but the payment of coſts being reſiſted, they contended that the averment in the declaration was ſufficiently proved by the evidence, ſince it appeared that the goods were ſeized by perſons being enemies of the King in a ſituation which rendered them the ſubject of prize; that although it appeared that the goods were contraband by the laws of *Spain*, it was not expreſsly ſtated in the admiſſions that they were ſeized for that reaſon, and that unleſs that circumſtance were diſtinctly made out the ſeizure of *Britiſh* goods by *Spaniſh* veſſels muſt be taken to be a ſeizure *jure belli*.

The Court however retaining their former opinion declared that the new trial ought to be granted without payment of coſts; and *Chambre* J. added, that he had no heſitation in ſtating, that in his opinion the Plaintiffs ought to have been nonſuited, becauſe the evidence produced did not ſupport the averment of loſs in the declaration.

Rule abſolute.

(*a*) See *Hurry* v. *The Royal Exchange Aſſurance Company*, *ante*, vol. 2. p. 430. and *Rucker* v. *The London Aſſurance Company*, *ante*, vol. 2. p. 432. *in notis*, where it was holden that goods were protected by the policy while on board public lighters employed to land them in the uſual courſe of trade.

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Feb. 8th.

NATHANIEL TAYNTON, Administrator, &c. of JOHN HANNAY deceased *v.* RAMSAY HANNAY.

The authority of an administrator appointed according to the provisions of the 38 G. 3. c. 87. during the absence of an executor from this country does not become actually void upon the death of such executor, but only voidable.

ASSUMPSIT. The declaration began thus: "*Ramsay Hannay* late of *Westminster*, &c. was attached to answer *Nathaniel Taynton*, administrator of all and singular the goods, chattels, and credits of *John Hannay*, specially appointed administrator thereof with the will annexed according to the force and effect of an act passed in the 38th year of the reign of his present Majesty, and also by a decree and decretal order of the High Court of Chancery of our Sovereign Lord the King, holden at *Westminster* in the county of *Middlesex*, made in a certain cause instituted in the said Court by one *Thomas Rainsford* and *Jane* his wife against the said *Nathaniel* and *Johnstone Hannay*, *Richard Hay*, and *Mary* his wife, and whilst the said cause was depending in the said Court of the Chancery of our said Lord the King, to wit, on *Thursday* the 21st day of *March* in the 39th year of the reign of our said Lord the King at *Westminster* in the said county of *Middlesex*, specially appointed to collect and get in the outstanding debts and effects of the said *John Hannay* according to the force and effect of the said act, as by the said decree and decretal order duly enrolled by the said Court of Chancery of our said Lord the King at *Westminster* in the said county of *Middlesex*, and now there remaining, relation being thereunto had, will amongst other things more fully and at large appear, of a plea of trespass on the case, and whereupon the said *Nathaniel* administrator as aforesaid and authorised as aforesaid complains For that whereas," &c. The declaration contained counts for money had and received, money lent and advanced, money paid, laid out, and expended, and upon an account stated in the lifetime of the testator, also a count upon an account stated with the Plaintiff, "administrator as aforesaid and authorised as aforesaid," and another for interest upon monies due or owing to the Plaintiff, "administrator as aforesaid and authorised as aforesaid," forborn by him "administrator as aforesaid and authorised as aforesaid." The breach to the above counts was in these words: "Yet the said *Ramsay* not regarding his aforesaid several promises and undertakings so made by him in this behalf as aforesaid, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said *John* in his lifetime, and the said *Nathaniel* administrator as aforesaid and authorised

authoriſed as aforeſaid ſince his death in this reſpect, hath not yet paid the ſaid ſeveral ſums of money or any part thereof to the ſaid *John* in his lifetime, or to the ſaid *Nathaniel* ſince his deceaſe (to which ſaid *Nathaniel* letters of adminiſtration of the goods, chattels, and credits of the ſaid *John* were according to the force and effect of an act paſſed in the 38th year of the reign of his preſent Majeſty by *John* by divine Providence Archbiſhop of *Canterbury*, primate of all *England* and Metropolitan in due form of law granted, to wit, at *Weſtminſter* aforeſaid in the county aforeſaid, on the 8th day of *December* 1798, and which ſaid *Nathaniel* was by a decree and decretal order of the High Court of Chancery of our Sovereign Lord the King, holden at *Weſtminſter* in the ſaid county of *Middleſex*, made in a certain cauſe inſtituted by one *Thomas Ramsford* and *Jane* his wife againſt the ſaid *Nathaniel*, *Johnſtone Hannay*, *Richard Hay* and *Mary* his wife, and whilſt the ſaid cauſe was depending in the ſaid Court of Chancery, to wit, on the 21ſt day of *March* in the 39th year of the reign of the now King, at *Weſtminſter*, in the ſaid county of *Middleſex*, ſpecially appointed to collect and get in the outſtanding perſonal eſtate of the ſaid *John Hannay*, according to the force and effect of the ſaid act as by the ſaid decree and decretal order duly inrolled in the ſaid High Court of Chancery at *Weſtminſter* aforeſaid in the county aforeſaid, and now there remaining, relation being thereunto had will more fully and at large appear) or to either of them, although ſo to do he the ſaid *Ramſay* was requeſted by the ſaid *John* in his lifetime and by the ſaid *Nathaniel* ſince his death afterwards, to wit, on the ſaid 1ſt day of *Auguſt* 1800 aforeſaid, and often afterwards, to wit, at *Weſtminſter* aforeſaid, nor did he pay the ſame or any part thereof to *Johnſtone Hannay*, to whom probate of the will of the ſaid *John* was by due authority granted, and which ſaid *Johnſtone Hannay* at the time of the granting of the ſaid letters of adminiſtration of the goods, chattels, and credits of the ſaid *John Hannay* to the ſaid *Nathaniel*, was and ſtill is reſiding out of the juriſdiction of his Majeſty's Courts of Law and Equity in that part of *Great Britain* commonly called *England*, and out of *England* aforeſaid, and which ſaid *Johnſtone Hannay* was at the time of the commencement of this ſuit reſiding out of the juriſdiction of his Majeſty's Courts of Law and Equity in that part of *Great Britain* commonly called *England*, and out of *England* aforeſaid, but he to do this hath hitherto wholly refuſed and ſtill refuſes: wherefore the ſaid *Nathaniel*, adminiſtrator as aforeſaid ſays, he is injured and hath

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ſuſtained damage to the value of 300*l.* and therefore he brings his ſuit, &c. And the ſaid *Nathaniel* in fact ſaith, that the ſaid decree and decretal order is in full force and effect not in anywiſe reverſed, annulled, ſet aſide, or rendered void. And he brings here into Court the letters of adminiſtration of the ſaid *John*, which ſufficiently prove to the Court here the granting thereof in form aforeſaid, the date whereof is on the day and year in that behalf mentioned."

The Plaintiff craved *oyer* of the letters of adminiſtration, which being accordingly ſet out, appeared to be in the form preſcribed by the Stat. 38 *Geo.* 3. *c.* 87. He then pleaded, 1ſt, *Non aſſumpſit*; 2dly, that *Johnſtone Hannay* was not at the time of the commencement of the ſuit reſiding out of *England*; 3dly, a ſet-off; upon which three pleas iſſues were joined. Fourthly, he pleaded "that the ſaid *Johnſtone Hannay* on the 18th day of *July* in the year of our Lord 1801, at *Weſtminſter* aforeſaid in the ſaid county, died."

To this laſt plea the Plaintiff demurred generally, and the Defendant joined in demurrer.

Onſlow Serjt. in ſupport of the demurrer. This queſtion depends upon the conſtruction of 38 *Geo.* 3. *c.* 87. and the decree of the Court of Chancery founded thereupon. That act after reciting that the laws then exiſting were not ſufficient to enforce a ſpeedy diſtribution of the aſſets of deceaſed perſons where the executor to whom probate of the will had been granted was out of the juriſdiction of his Majeſty's Courts of Law and Equity, provides that where ſuch executor ſhall reſide out of the juriſdiction of ſuch Courts, the Eccleſiaſtical Court may on the application of any creditor, next of kin or legatee, grant to any perſon named on their behalf ſpecial adminiſtration for the purpoſe of being made a party to a bill in equity to be exhibited againſt him, and to carry the decree into effect but no farther. The 4th ſection enacts that the Court of Equity in which ſuch ſuit ſhall be depending may appoint any perſon to collect the debts due to the eſtate and give diſcharges for the ſame. The fifth ſection contains this proviſo, "that if the executor capable of acting as ſuch ſhall return to and reſide within the juriſdiction of any of the ſaid Courts pending ſuch ſuit, ſuch executor ſhall be made party to ſuch ſuit, and the coſts incurred by granting ſuch adminiſtration and by proceeding in ſuch ſuit againſt ſuch adminiſtrator, ſhall be paid by ſuch perſon or out of ſuch fund as the Court where ſuch

ſuit is depending ſhall direct. Now the preſent Plaintiff having been appointed adminiſtrator by the Eccleſiaſtical Court and collector of the debts due to the teſtator under a decree of the Court of Chancery, nothing is diſcloſed by the plea to prevent him from proceeding in this ſuit. It appears from the proviſo in the 5th ſection that the Legiſlature did not intend that the ſpecial adminiſtration ſhould ceaſe immediately upon the return of the executor; for if that authority were to ceaſe on that event happening, it would be unneceſſary for the executor to be made a party to the ſuit in Equity; and if the authority does not ceaſe immediately upon the return of the original executor, neither will it ceaſe upon the death of ſuch executor. Upon the death or return of the executor the authority of the ſpecial adminiſtrator becomes voidable, but it cannot be actually avoided without obtaining a reverſal of the decree of the Court of Equity, and poſſibly the Court of Equity might refuſe to reverſe the decree without obliging thoſe who applied for ſuch reverſal to pay the coſts incurred or bring the fund into Court.

Bayley Serjt. *contrà*. The authority derived under this act of Parliament is a temporary adminiſtration granted for ſpecial purpoſes, and when thoſe purpoſes ceaſe, the authority is not merely voidable, but void. If an executor reſident out of the kingdom never prove the will, and adminiſtration be granted to one *durante abſentiâ* of ſuch executor, upon the return of the executor the adminiſtration becomes void. *Slater* v. *May*, 2 Lord *Raym.* 1071. So where adminiſtration is granted *durante minori ætate*, if pending the action the minor comes of age it may be pleaded in bar *puis darrein continuance*. *Major* v. *Peck*, 1 *Lutw.* 338. In caſe of the death of the executor *a fortiori* the above rule muſt prevail, for if he leave a will and appoint an executor reſident within the kingdom, that executor becomes the legal repreſentative of the firſt teſtator, and if no executor be nominated, adminiſtration *de bonis non* may be taken out. If an adminiſtrator *durante abſentiâ* of the executor who has not proved the will file a bill in equity or commence an action at law, it is clear that upon the death of the executor ſuch ſuit will abate, and if it had been the intention of the Legiſlature that ſuch ſuits commenced by an adminiſtrator appointed under the ſtatute on account of the abſence of an executor who has proved ſhould not abate, it is reaſonable to ſuppoſe that ſome proviſion would have been introduced to put both caſes upon the ſame footing.

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Lord ALVANLEY Ch. J. On the beſt conſideration which I can beſtow upon this caſe I am of opinion that the power derived under this act of Parliament and the decree of the Court of Chancery muſt from the nature of the caſe be held to be determined by the death of the executor; on which event a new right accrued to ſome other perſon to take out adminiſtration either as next of kin to the original teſtator, or as executor of the deceaſed executor. I do not think that the act of Parliament has gone far enough to confer any right upon the ſpecial adminiſtrator, after the cauſes have ceaſed for which the adminiſtration was granted. The object of thoſe who introduced this act was to remedy the inconvenience ariſing from the Eccleſiaſtical Courts not thinking themſelves authoriſed to grant a new adminiſtration where probate had been once granted and the executor was gone abroad. The conſequence of this defect in their authority was that there was no perſon exiſting within the juriſdiction of the Courts of Law or Equity duly authoriſed to appear or to collect the debts, as there was in thoſe caſes where adminiſtration was granted *durante abſentiâ* of an executor who had never proved the will. It never was ſuppoſed that a Court of Equity had any power, before any ſuit commenced againſt the executor, to appoint a perſon to collect the debts of the teſtator: but when once a perſon capable of ſuſtaining the character of legal repreſentative was brought into a Court of Equity, that Court in caſe of his inſolvency or miſconduct would appoint another perſon to manage the affairs of the teſtator, and compel the legal repreſentative to permit ſuch perſon to ſue in his name: but even in that caſe the perſon ſo appointed could never be empowered to ſue in his own name. This being the caſe, if an executor to whom probate had been granted went abroad, nothing could be done: the Court of Equity could entertain no ſuit, there being no perſon to ſtand in the ſituation of the teſtator, and the Eccleſiaſtical Court could not grant adminiſtration *ad colligenda bona*. The act of Parliament after reciting this grievance authoriſes the Spiritual Court to grant ſpecial letters of adminiſtration in the form there ſet forth: from the words of which letters we muſt learn the authority of the adminiſtrator. Now by the letters of adminiſtration it appears that he is conſtituted adminiſtrator for the purpoſe of being made a party to a bill in equity to be exhibited againſt him, and to carry the decree into effect, "but no further or otherwiſe:" ſo that the authority is

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ſpecially confined to the purpoſes of that ſuit. Then it is urged that by virtue of the fourth ſection of the act the Plaintiff being ſuch adminiſtrator is appointed by the Court of Equity to collect the debts; and that the authority under that appointment ſtill ſubſiſts. But how long is the ſuit in equity to continue? and how long is the collector to act? It is anſwered that the act has provided, that upon the return of the executor he may be made a party to the ſuit in equity, and may obtain a reverſal of the appointment. But it ſeems to me that the moment the executor becomes ameſnable to the Court he not only may but muſt be made a party to the ſuit, and that until he be, the cauſe muſt ſtand ſtill, and there muſt be an end of the collection of the debts. For a Court of Equity to authoriſe a perſon to collect the debts of a teſtator in the room of the real repreſentative, when that repreſentative is capable of being brought before the Court, and yet is not brought before the Court, would be a proceeding altogether unheard of, and would be infringing on his legal rights. He might take out probate of the will, and thereby at once ſuperſede the authority of the ſpecial adminiſtrator and collector. The true conſtruction of the act as it ſeems to me is this, that where the real repreſentative is beyond the juriſdiction of the Court of Chancery and incapable of acting for himſelf a power is given to ſubſtitute another perſon during his abſence: but the moment ſuch repreſentative is capable of doing his own duty, or that in conſequence of his death any other perſon becomes entitled to perform that duty in his ſtead by taking out adminiſtration, all the inconvenience which it was the object of the act to provide againſt is at an end: and conſequently the power which was given to the ſpecial adminiſtrator during the abſence of the executor is done away. Though I could have wiſhed that the act had gone farther and authoriſed the ſpecial adminiſtrator to act until a new adminiſtration had been taken out, yet under the terms of this act of Parliament I cannot find that we are authoriſed to extend the power of the ſpecial adminiſtrator, ſince by ſo doing we ſhould enable him to collect all the debts which it belongs to the new repreſentative to collect, before the latter could have an opportunity of inveſting himſelf with the proper authority. The act of Parliament provides only for a ſpecial caſe; and the moment that any perſon capable of acting as repreſentative comes within the juriſdiction of the Courts of Law and Equity the power ceaſes; and

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the Court of Equity will not proceed in the ſuit until he be made a party. Under the circumſtances of this caſe the Court of Equity probably would ſuperſede the power given to the Plaintiff. If the next of kin to the original teſtator were to refuſe to take out adminiſtration, the Spiritual Court would grant adminiſtration *ad colligenda bona:* but this is only done upon the refuſal of the party entitled; and the authority in ſuch caſe would not be derived from the Court of Chancery but from the Spiritual Court. Upon the whole I am of opinion that the adminiſtration is at an end, and that the preſent Plaintiff cannot maintain the action in his own name.

ROOKE J. This is a queſtion on the conſtruction of a new act of Parliament, and it is with conſiderable diffidence I entertain an opinion different from that of my Lord on the interpretation to be put upon that act; eſpecially when I conſider his long experience in a Court of Equity. As this is a new caſe I think the beſt courſe which we can purſue is to adopt that conſtruction which will moſt eſſentially promote the ends of juſtice. The objection is taken not by the executor, nor by any perſon having a right in conſequence of his death, but by a debtor only, who is at all events anſwerable to the eſtate of the deceaſed teſtator. The perſon who now ſues, does it under a ſpecial authority granted to him by virtue of the act of Parliament, and is entirely under the control of the Court of Equity by which he is appointed collector, and to which he is accountable for every ſtep of his proceedings. Though on the death of the executor a new right accrues, yet until that right be completed and reduced into effect, I think the ſpecial authority granted to the Plaintiff ought to continue in force. Let us ſee what this ſpecial adminiſtration is. The Plaintiff is appointed adminiſtrator for the purpoſe of becoming a party to the bill in Equity and of carrying the decree into execution but no further. The adminiſtration therefore is confided to him; and during the abſence of the executor, while living, he certainly could collect the effects by ſuing in a Court of Law and his title would be there recognized. Now the Legiſlature have foreſeen one caſe and provided for it, *viz.* the return of the executor; in which event the ſuit in Equity does not abate but the executor is only to be made a party to it. Then ſhall we put ſuch a conſtruction on the act as to ſay, that in conſequence of the death of the executor the preſent ſuit is abated and that the action muſt be

begun *de novo* by the new representative. As the ſuit in Equity does not abate upon the return of the executor I think we are warranted in ſaying that it continues until the appointment of a new repreſentative notwithſtanding the death of the executor. If this conſtruction be not put upon the act great inconvenience may enſue. Suppoſe the executor to die in *India* and no intelligence to arrive in *England* of his death till ſix months afterwards; if all the intermediate acts of the ſpecial adminiſtrator are to be ſet aſide great confuſion will follow. I am therefore of opinion that the authority of the Plaintiff, though it became voidable by the death of the executor, was not rendered actually void.

CHAMBRE J. I entirely concur with my brother *Rooke* in thinking that the plea is bad, and that the Plaintiff is entitled to judgment, and I will add that I have no great difficulty in forming this opinion. This act of Parliament was certainly made for very beneficial purpoſes, but many of its proviſions have been framed with a very ſhort-ſighted view of legal conſequences: of this I could point out many inſtances, but it is not neceſſary in the preſent caſe. The ſpecial adminiſtration in the preſent caſe has been compared to other limited adminiſtrations; which however appear to me to be of a very different ſort. Where adminiſtration is granted *durante abſentia*, or *durante minoritate*, it expires by the terms of the authority upon the executor returning or coming of age: and if we could find that the Legiſlature had preſcribed any expreſs limitation in the preſent inſtance by the terms in which the authority is directed to be granted, we ſhould be bound to abide by the expreſſions of the ſtatute. But I think that the intention of the Legiſlature was not to limit the authority to the return or death of the executor: and certainly I am not inclined by argument from analogy to narrow the beneficial effects of this act, but on the contrary where the conſtruction is doubtful I ſhould rather be diſpoſed to enlarge them. Great inconvenience might ariſe from the conſtruction contended for by the Defendant. And though, when all the parties are reſident in *England*, theſe inconveniences may be eaſily remedied by taking out adminiſtration, yet other caſes might give riſe to great embarraſſment, and the preſent affords a ſtriking inſtance of this ſort. It is ſaid that *Johnſtone Hannay* died in *India*, but under what circumſtances, and whether he left a will and appointed an executor, does not appear. Till theſe circumſtances can be aſcertain-

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ed, and the will of the deceaſed executor proved, or adminiſtration to the original teſtator taken out, all proceedings to do juſtice to the creditors muſt be ſuſpended, and two years may elapſe before any thing can be done. This is a limited adminiſtration, and the nature of the limitation muſt be collected from the form of the letters of adminiſtration which the act preſcribes. Now the letters take no notice of the Courts of Law, but direct that the party ſhall be adminiſtrator for the purpoſe of becoming a party to a ſuit in equity and of carrying the decree in that ſuit into effect, and no further or otherwiſe. The authority is limited and ſtrictly limited. The party therefore is not a general adminiſtrator of the effects, but is only an adminiſtrator for the purpoſes of the ſuit in equity: yet being created by the act adminiſtrator for the purpoſes of the ſuit he is adminiſtrator during the ſuit, and is to do every thing neceſſary to give effect to the ſuit. Then what has the Court of Equity directed him to do? The declaration ſays that he is appointed to collect and get in the outſtanding debts, which implies an authority to bring actions for them, and that authority he has exerciſed in bringing the preſent action. This conſtruction appears to me to be ſtrictly warranted by the latter part of the fifth ſection, which, looking to the arrival of the executor and regarding the ſpecial adminiſtrator not as a ſubſtitute for the executor to all intents, but merely for the purpoſes of the ſuit, does not ſuppoſe that ſuch arrival would abſolutely ſuperſede his authority, but directs that the executor ſhall be made a party to the ſuit in equity upon which the authority of the adminiſtrator would ceaſe. And though no proviſion is made in this ſection in caſe of the death of the executor, yet I ſhould think that upon his death without a will, if any perſon ſhould take out a general adminiſtration as next of kin to the original teſtator, or in caſe of his having made a will and that will being proved by any perſon capable of acting as executor, ſuch adminiſtrator or executor might apply to be made a party to the ſuit in equity, and it would be matter of courſe for the Court of Equity to put an end to the authority of the ſpecial adminiſtrator. But though I think that a Court of Equity under theſe circumſtances would be authoriſed by analogy to adopt this line of conduct, it is unneceſſary for me to give an expreſs opinion upon that point. I take it to be clear that the Plaintiff muſt be conſidered as adminiſtrator during the continuance of the ſuit in Equity, until ſome act has been

done either by the Court of Chancery or the Ecclesiastical Court to determine his authority. In this case nothing has been done. Under these circumstances therefore I am of opinion that the authority of the Plaintiff remains, and that judgment ought to be given in his favour.

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Judgment for the Plaintiff.

MORCK and Another *v.* ABEL.

Mich. 9th.

THIS was an action on a policy of insurance effected on the 26th *July* 1797 on goods on board the *Juliana Maria*, warranted *Danish* ship and property, "at and from *Bengal* and all and every port or place whereſoever and whatſoever, as well on the other ſide as at and on this ſide the *Cape of Good Hope*, in port and at ſea, in all places and at all times, with liberty to touch, ſtay, and trade, load and unload and reload; at all and any of the ſaid ports and places, until the ſhip's arrival at *Copenhagen*." The declaration alleged that the cargo was put on board at *Calcutta* in *Bengal*, that the Plaintiffs were intereſted, and that the ſhip and cargo were afterwards captured "by certain then enemies of our Lord the King."

The cauſe was tried before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after laſt *Michaelmas* Term, when it appeared that the Plaintiffs were ſubjects of *Denmark* and reſident in *Copenhagen*, and the ſhip *Juliana Maria* a *Duniſh* ſhip; that the cargo which was the ſubject of the preſent inſurance was taken on board at *Calcutta* on the 5th *March* 1797; and that the ſhip and cargo on the voyage from *Calcutta* to *Copenhagen* were captured by the *French* and condemned as prize. An objection was taken to the Plaintiffs' recovery on the ground of its being illegal under the proviſions of the 12 *Car.* 2. *c.* 18. *ſ.* 1. to export goods from *Calcutta* in any ſhip not belonging to a *Britiſh* ſubject: and this objection prevailing the Plaintiffs then inſiſted that if the exportation from *Calcutta* were illegal, the riſk never commenced, and that the Plaintiffs therefore were entitled to a return of premium. The Jury were directed by his Lordſhip to find a verdict for the Plaintiffs, liberty being reſerved to the Defendant to move that ſuch verdict might be ſet aſide and a nonſuit be entered.

Accordingly a rule *Niſi* for that purpoſe having been obtained, *Shepherd* and *Beſt* Serjts. now ſhewed cauſe. Admitting the principle

A foreigner cannot recover back the premium paid by him upon a policy of inſurance, if the voyage be in contravention of the *Britiſh* laws. Therefore where a policy was effected upon a *Daniſh* ſhip at and from *Bengal* (in which there are *Daniſh* ſettlements) to *Copenhagen*, and the ſhip loaded at *Calcutta* contrary to the 12 *Car.* 2. *c.* 18. *ſ.* 1. the Court held that the aſſured was not entitled to recover back the premium even though it appeared that the practice of loading foreign ſhips at *Calcutta* had prevailed for a length of time, and had been authoriſed by act of Parliament ſoon after the ſhipment in queſtion.

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ciple laid down in *Vandyck* v. *Hewitt*, 1 *East*. 96. that where a policy is effected to infure a trading with an enemy, the contract is ſuch a complete violation of the general law of the country, that the aſſured cannot recover back his premium, ſtill that principle cannot govern the preſent caſe. The loading the cargo inſured at *Calcutta* by the Plaintiffs was merely a violation of a particular law, to which though every *Britiſh* ſubject is bound to pay implicit obedience, yet, as againſt a foreigner, a knowledge of that law cannot be implied ſo as to ſubject him to the ſame penalties for the diſobedience of the law which a *Britiſh* ſubject would incur. Now the policy in the preſent caſe being effected in favour of a *Daniſh* ſubject and being contrary to the municipal law not of his own country but of *Great Britain*, is certainly not an immoral contract: for though it be immoral in the ſubject of any ſtate to violate the laws of his own ſtate, yet it is not immoral in him to violate the local regulations of another ſtate. In *Vandyck* v. *Hewitt* Lord *Kenyon* obſerves, "there is no diſtinguiſhing this caſe in principle from the common caſe of a ſmuggling tranſaction: where the vendor aſſiſts the vendee in running the goods to evade the laws of the country he cannot recover the goods themſelves or the value of them." Undoubtedly that poſition is completely eſtabliſhed by the caſes of *Clugas* v. *Peñaluna*, 4 *Term Rep.* 466. and *Weymel* v. *Read*, 5 *Term Rep.* 599. But it is to be obſerved that the principle on which thoſe deciſions in part proceeded was, that where a foreigner aſſiſts in the attempt to evade the *Britiſh* laws, as by packing the goods in a manner convenient for ſmuggling, he thereby evidences his knowledge of the law which he violates, and cannot therefore avail himſelf of the plea of ignorance to which the preſent Plaintiffs are entitled. If there be any caſe in which the Court will preſume a party ignorant of the law which he has violated for the purpoſe of enabling him to recover, they may do ſo in this: for it may well be preſumed that the Plaintiffs were not aware that it was unlawful to export in any other than a *Britiſh* ſhip, ſince previous to the ſhipment in queſtion, ſuch a practice had prevailed and been encouraged: ſo much ſo that on the 19th *July* 1797, only four months after this cargo was taken on board, the 37 *Geo.* 3. *c.* 117. was paſſed, which after reciting the expediency of allowing ſhips belonging to ſtates in amity with this country to bring goods from

India,

India, removed under certain reſtrictions the prohibition impoſed by the navigation act. 1802.

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Vaughan Serjt. *contra*. In *Howſon* v. *Hancock*, 8 *Term Rep.* 577. Lord *Kenyon* ſays, "there is no caſe to be found where when money has been actually paid by one of two parties to the other on an illegal contract, both being *participes criminis*, an action has been maintained to recover it back again." His Lordſhip adds, "here the money was not paid on an immoral, though an illegal conſideration: and though the law would not have enforced the payment of it yet having been paid it is not againſt conſcience for the Defendant to retain it." If the propoſition laid down by Lord *Kenyon* be true where both parties are *participes criminis*, ſurely it will apply with double force to the preſent caſe where the Plaintiff is the ſole offending party; for this policy being general from *Bengal*, where the *Danes* have ſettlements, to *Copenhagen* was not illegal when effected, though the ſubſequent illegal act of loading from *Calcutta* has deprived the Plaintiff of his right to recover. The caſe of *Vandyck* v. *Hewitt* has been diſtinguiſhed on the ground of the Plaintiffs in that caſe having violated the general law of the country, whereas the preſent Plaintiffs have, it is ſaid, offended againſt a mere municipal regulation. But the act of navigation, which was in fact paſſed againſt foreigners, and has formed ſo eſſential a groundwork of our naval ſtrength, can hardly be deemed a mere municipal regulation, or wholly unknown to foreigners. It is to be obſerved that the preſent Plaintiffs never claimed the return of premium until they had failed in their demand for a total loſs; the riſk therefore was run before the contract was attempted to be reſcinded, and the diſtinction ſometimes taken between contracts executory and executed will not help the Plaintiffs' claim. The caſes of *Lowry* v. *Bourdieu*, *Doug.* 468. and *Andrée* v. *Fletcher*, 3 *Term Rep.* 266. are deciſive to ſhew that the Plaintiffs are not entitled to recover; for in both thoſe caſes the policies being illegal, and the riſk been run the aſſured were not allowed to recover the premium.

Lord ALVANLEY Ch. J. Unfortunately this policy was effected previous to the paſſing of the 37 *Geo.* 3.; and though I believe that before the paſſing of that ſtatute the proviſions of the navigation laws had been relaxed in practice with reſpect to foreigners, ſtill in a Court of Law the Plaintiffs are not entitled to recover if the trading in queſtion contravened the regulations of

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that act. The point however upon which this case comes before the Court is, whether there be any difference between this case and that of *Vandyck* v. *Hewitt*? Undoubtedly that was a case in which the trading was in direct violation of the common law of this country, but before that decision took place, many of the distinctions which had been taken between immoral and illegal contracts had been considerably shaken; and the principle which I think must now be extracted from the cases upon this subject is, that no man can come into a *British* Court of Justice to seek the assistance of the law who founds his claim upon a contravention of the *British* laws. Let us consider then what this policy is. It is an insurance upon a voyage from any part of *Bengal* to *Copenhagen*. The underwriter contends, that large as the policy is, still it is the business of the assured to take care that he takes in his cargo at some port in *India* where he may legally do so. The assured having loaded at *Calcutta*, has not attended to that restriction, but has thereby contravened the navigation act. Capture being one of the losses insured against, the assured has claimed an indemnity upon that ground: to which the *British* underwriter answers, you had no right to take in your cargo at a *British* settlement, and therefore he refuses to pay. The assured sets up a distinction in his own favour upon the ground of his being a foreigner, and urges that although he may have contravened the *British* laws, he has done so from ignorance only. But even looking at the case in this point of view I do not think the Plaintiff is taken out of the general rule applicable to cases where a party enters into an illegal contract. The case of *Andrée* v. *Fletcher* is a very strong authority, for there it was holden that a foreigner could not recover back the premium paid on a policy which was illegal according to the laws of this country. The question here is, whether the Plaintiff having contravened the *British* laws, can recover by the aid of those laws? and after consideration of all the cases, I am of opinion that he cannot recover and that the Defendant is entitled to have a nonsuit entered.

Rooke J. (*a*). I consider the point made in this case as having been decided in the case of *Andrée* v. *Fletcher*: and I do not see any reason to differ from that authority. If the assured instead of

(*a*) *Heath* J. having been absent during the former part of the Term from indisposition, and not having heard the argument on the part of the Plaintiffs, gave no opinion upon the case.

seeking to recover for a total loss had in the first instance stated to the underwriters that as the cargo was loaded from *Calcutta* they had no right to recover upon the policy, and therefore sought a return of premium, there might have been some pretence for the claim which he has made: but instead of adopting this line of conduct they have first endeavoured to affirm the contract by making a demand for a total loss, and failing in that, they now disaffirm the contract and seek a return of premium. But it appears to me that they are not entitled to succeed, for having acted in defiance of the laws of this country they shall not have the assistance of those laws to enable them to recover.

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CHAMBRE J. I am of the same opinion. It is perfectly settled that in the case of an illegal contract neither party can recover from the other money paid upon that contract: and that rule must prevail in the present case unless the Plaintiffs can establish a distinction in their own favour on the ground of being foreigners and ignorant of our laws. But I think that we ought not to relax the rigour of our great political regulations in favour of foreigners offending against them, and that there is very little reason to presume ignorance of a law peculiarly applicable to the subjects of foreign states. Upon the whole therefore I am of opinion that the Plaintiffs are not entitled to recover back the premium.

Rule absolute.

FIELD *v.* WAINEWRIGHT.

Feb. 10th.

SHEPHERD Serjt. moved to justify bail by affidavit in this and three other actions, the same persons being bail in each action, and in each of their affidavits swearing to property to double the amount of the debt in the single action in which the affidavit was entitled, and not to double the amount of the debt in all the four actions in which they were to justify.

In justifying bail by affidavit where the same persons are bail in more actions than one, each affidavit ought to state that the bail are worth double the amount of the debts in all the actions wherein they offer to become bail.

On this ground *Bayley* Serjt. opposed their justification.

And *The Court* after reference to the officers allowed the objection, but gave the Defendant time to amend the affidavits.

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CARPENTER and Others, Aſſignees of FOWLER a Bankrupt *v.* MARNELL.

Property in which a bankrupt has only a trust eſtate does not paſs to his aſſignees under the aſſignment. The *cestuy que* trust cannot bring any action reſpecting ſuch property in their names, but ought to bring it in the name of the bankrupt.

Aſſumpſit on a note in theſe words: "I promiſe to pay to Mr. *Joſeph Fowler* or order the ſum of 150*l.* being the remainder of the conſideration for the aſſignment of his intereſt in the *Payton* buſineſs to me, as ſoon as I ſhall receive or may receive the money due upon the completion of the ſaid buſineſs from *T. B.* Eſquire, his executors, adminiſtrators, or aſſigns, or immediately upon my receiving letters of adminiſtration of the eſtate and effects of Lieutenant-General *Joſeph Walton*, otherwiſe *Brome*, deceaſed, whichever event ſhall firſt take place," Signed "*Richard Marnell.*" This note was indorſed by *Fowler* to one *James Bagſter* for a valuable conſideration, after which *Fowler* became bankrupt and the Plaintiffs were choſen his aſſignees; in which capacity they now ſued for the benefit of *Bagſter*.

The cauſe was tried before Lord *Alvanley* Ch. J. at the *Weſtminſter* Sittings after *Michaelmas* Term, and a verdict was found for the Plaintiffs ſubject to the opinion of the Court whether the action was maintainable by them as aſſignees of *Fowler*.

A rule *Niſi* having been obtained on a former day for ſetting aſide the verdict, and entering a nonſuit,

Beſt and *Onſlow* Serjts. now ſhewed cauſe and inſiſted that the action was well brought by the Plaintiffs as aſſignees of *Fowler*; that as the note was not negotiable the action could not have been maintained by *Bagſter* himſelf, and though it might poſſibly have been ſuſtained if brought by *Fowler* yet it did not follow that it might not alſo be brought by the aſſignees, for that there were many caſes where an action might be ſuſtained either by the bankrupt himſelf or by his aſſignees; as in *Fowler* v. *Down*, *ante*, vol. 1. p. 44. and *Webb* v. *Fox*, 7 *Term Rep.* 391. and the ſeveral caſes there cited, by which it was eſtabliſhed that an uncertificated bankrupt or his aſſignees might maintain actions relative to property acquired ſubſequent to the bankruptcy; that the only caſes which tended to ſhew that the action was not well brought were *Winch* v. *Keeley*, 1 *Term Rep.* 619. and *Bottomley* v. *Brook*, 22 *Geo.* 3. *C. B.* cit. *ibid.* 621.; but that in both thoſe caſes it appeared upon the record that the Plaintiffs were not beneficially intereſted

tereſted in the inſtruments upon which they ſued, and as at that time the preciſe point there determined was conſidered as new, and Lord *Kenyon* had in a ſubſequent caſe of *Bauerman* v. *Radenius*, 7 *Term Rep.* 663. laid it down as clear that Courts of Law can only take notice of legal rights, the Court in this caſe, which did not fall preciſely within the authority of *Winch* v. *Keeley* or *Bottomley* v. *Brook*, would not extend the equitable doctrines there adopted. They obſerved that it appeared to have been the opinion of Lord *Hardwicke*, that a legal eſtate in the truſt property of a bankrupt paſſed to his aſſignees, ſince he thought it neceſſary to direct in the caſe *Ex parte Newton*, 1 *Atk.* 97. that where an aſſignee is removed on account of his own bankruptcy, not only he but his aſſignees ſhould join with the commiſſioners in executing the aſſignment to the new aſſignees.

Shepherd Serjt. *contrà* contended that where a bankrupt is intereſted as a mere truſtee, the debt does not paſs under the commiſſion; that this point was expreſsly decided in *Winch* v. *Keeley*, in which caſe the bankruptcy of the Plaintiff having been pleaded, the Plaintiff replied that he was a truſtee, and upon demurrer that replication was held good; that in the preſent caſe the Defendant could not have ſtated the ſpecial facts upon the record, ſince it would only have amounted to the general iſſue, which is, that the aſſignees have not nor ever had any right of action; and that as nothing ever paſſed to the aſſignees in the note upon which this action was founded, it was impoſſible to contend with any ſucceſs that either they or the bankrupt might maintain the action.

Lord ALVANLEY Ch. J. We are all of opinion that this action ought to have been brought by *Fowler*. He was the perſon to whom the promiſe to pay was made; he by his indorſement directed the contents of the note to be paid to *Bagſter*, and though this indorſement had no legal effect, yet it paſſed the beneficial intereſt in the note to *Bagſter*, and *Fowler* by the indorſement became a mere truſtee for him. The aſſignees never were in a ſituation to derive any benefit from this piece of paper. If indeed they had poſſeſſed the moſt remote poſſibility of intereſt, or if they could ſtate any thing from which a benefit to the creditors would reſult, I ſhould hold that the action might be maintained; but at the time when they brought this action it was impoſſible for them not to know that they had no right to the note. They bring the action in the character of truſtees; but they are not truſtees for *Bagſter*; they are only truſtees for *Fowler*'s creditors, and therefore cannot ſuſtain this action.

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HEATH J. expreſſed himſelf of the ſame opinion, and obſerved that Lord *Hardwicke*'s direction was only *in majorem cautelam.*

ROOKE and CHAMBRE Js. concurred.

Rule abſolute.

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An uſage for carriers to retain goods as a lien for a general balance of account between them and the conſignees, cannot affect the right of the conſignor to ſtop the goods *in tranſitu*. *Semb.* that ſuch a lien could not be eſtabliſhed even by agreement between the carrier and the conſignor.

TROVER for goods.

At the trial before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after laſt *Michaelmas* Term, it appeared from admiſſions that the Defendant was a common carrier from *London* to *Exeter* and *Plymouth*, and as ſuch received the goods in queſtion from the Plaintiffs, by whom they were conſigned to the houſe of *Negretti* and Co. at *Plymouth*; that *Negretti* and Co. when they ordered the goods to be ſent gave no directions reſpecting any particular carrier, and that there was another carrier from *London* to *Plymouth* beſides the Defendant; that previous to the arrival of the goods at *Plymouth*, *Negretti* and Co. had failed, and a notice had been given to the Defendant by the Plaintiffs not to deliver them to *Negretti* and Co., the Plaintiffs at the ſame time tendering to the Defendant his charge of 1*l.* 7*s.* 2*d.* for the carriage of the goods and offering to indemnify him; that the carriage of the goods was to have been paid by *Negretti* and Co. if the goods had been delivered to them; and that the ſum of 4*l.* 7*s.* was due from *Negretti* and Co. to the Defendant for the carriage of other goods; that the Defendant offered to deliver the goods to the Plaintiffs on their paying him the two ſums of 4*l.* 7*s.* and 1*l.* 7*s.* 2*d.* and indemnifying him; that the Defendant in *January* 1801 gave public notice by circulating hand-bills and advertiſements in the *London* Gazette and other newſpapers, that all goods which ſhould be delivered for the purpoſe of being carried, would be conſidered as general liens and ſubject not only to the money due for the carriage of ſuch particular goods, but alſo to the general balance due from the reſpective owners to the proprietor of the waggon, and that one of the above mentioned hand-bills had been delivered to *Negretti* and Co. at their ſhop in *February* laſt. The Defendant then offered evidence to ſhew that it was the uſage among carriers to retain for their general balance, but Lord *Alvanley* rejected the evidence, being of opinion that it was not admiſſible, and that the conſignor's right to ſtop *in tranſitu* could not be affected by ſuch an uſage if eſtabliſhed. A verdict was found for the Plaintiffs with liberty to the Defendant to apply to the Court for a new trial.

Accordingly

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Accordingly a rule *Nisi* having been obtained on a former day, *Lens* and *Best* Serjts. were now called upon to support the rule. The right of the consignor to stop goods *in transitû* is a mere equitable right and cannot be supported on the ground of a strict legal claim. Indeed no case is to be found in the books where this right has prevailed against any other than the immediate consignee, and it has never yet been allowed to affect third persons. Whatever might have been the prevailing opinion previous to the case of *Dawes* v. *Peck*, 8 *Term Rep.* 330., it is fully established by that case that where the consignee appoints a particular carrier, pays the carriage, and is answerable to the consignor for the goods notwithstanding they are lost or damaged on the road, the consignee is the only person who can maintain an action against the carrier for such loss or damage. This shews that the delivery to the carrier is a delivery to the consignee so far as to vest the legal right to the goods in him; and though in the present case it is admitted that there was another carrier by whom these goods might have been sent, and that no particular directions were given by *Negretti* and Co. by whom they should be sent, yet it is expressly stated that they were to pay the carriage. If then the right to stoppage *in transitû* be a mere equitable right, it must like other equitable rights operate only as between the two contracting parties, and cannot affect third persons. It is to be recollected that it is a right of but late introduction into the law of *England*, *Wiseman* v. *Vandeput*, 2 *Vern.* 203. being the first case in which it was recognised, and there it was treated as an equitable right; and though Lord *Hardwicke* in *Snee* v. *Prescot*, 1 *Atk.* 245. went farther and considered it more as a legal right, still the question there was between the consignor and consignee only without the intervention of a third person. In *Lickbarrow* v. *Mason*, 2 *Term Rep.* 63. 1 *H. Bl.* 357. 2 *H. Bl.* 211. 5 *Term Rep.* 367. 683. the interest of third persons as affected by the doctrine of stoppage *in transitû* came to be considered, and after much discussion it was finally settled that however the right might prevail as between consignor and consignee, it could not prevail against a person holding under a bill of lading indorsed to him by the latter. That case only differs from the present in respect of a transfer of property by a bill of lading being more formal, than a transfer by delivery to a carrier; but if the latter so far vests the property in the consignee as to enable him to sue for any loss or damage, no

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legal right can remain in the conſignor? Lord *Kenyon* in *Dawes* v. *Peck* reprobated the idea of the property being in a fluctuating ſtate between the conſignor and the conſignee, and Mr. Juſtice *Groſe* in the ſame caſe calls the conſignor's right to ſtop *in tranſitû* "in its nature an equitable right." So in *Hodſon* v. *Loy*, 7 *Term Rep.* 445. Lord *Kenyon* conſiders the right as a "kind of equitable lien adopted by the law for the purpoſes of ſubſtantial juſtice," and obſerves that it does not proceed on the ground of reſcinding the contract. If then the property in the goods veſted in *Negretti* and Co. by delivery to the Defendant, a portion of their legal right veſted in the Defendant and which will be ſufficient to countervail the equitable right of the Plaintiffs. The latter claim through *Negretti* and Co. and therefore can only claim to the ſame extent as *Negretti* and Co. could have claimed. That the Defendant had a right to ſet up a general lien againſt the conſignee of the goods, is clear, and was admitted in *Naylor* v. *Mangle*, 1 *Eſp. N. P. Caſ.* 109. and alſo in a caſe of *Aſpinall* v. *Pickford* (*a*), 9th *June* 1800, *coram* Lord *Kenyon* at *Guildhall*. The ſame lien has been eſtabliſhed in favour of wharfingers, dyers, and bleachers; as in *Kirkman* v. *Shawcroſs*, 6 *Term Rep.* 14. and in *Roſs* v. *Johnſon*, 5 *Bur.* 2827. Lord *Mansfield* ſays, "it is impoſſible to make a diſtinction between a wharfinger and a common carrier;" in this caſe however it ſhould have been left to the Jury to decide whether the conſignor was not aware of the cuſtom acted upon by the Defendant (and of which notice was given to the conſignees) of retaining for a general balance; in which caſe a contract of the ſame kind might have been preſumed as againſt him.

Shepherd and *Bayley* Serjts. *contrà*. The conſignor's right to ſtop *in tranſitû* is not an equitable, but a ſtrict legal right. *Burghall* v. *Howard*, 1 *H. Bl.* 365. *n.* where Lord *Mansfield* ſays, that the conſignor's right is founded "not upon principles of equity only, but the laws of property." Indeed if it were otherwiſe, it would not have been poſſible, as has been done in ſeveral caſes,

(*a*) *Aſpinall, aſſignee of Howarth* v. *Pickford.*

Guildhall Sittings after *Eaſt.* T. *coram* Lord *Kenyon.*

Trover for goods.

The defence was that the goods were put by *Howarth* into the hands of the Defendant as a carrier to be forwarded from *Manchester* to his warehouſe in *London*, and that the Defendant was entitled to retain againſt the eſtate for the general balance due from *Howarth* for the carriage of goods. This right was eſtabliſhed by evidence of the Defendant having before claimed and been allowed to retain for his general balance both againſt bankrupt eſtates and ſolvent cuſtomers, and alſo by the evidence of a principal carrier on the weſtern road to the ſame effect reſpecting himſelf.

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for the conſignor to have maintained trover againſt the carrier or the captain of the ſhip. The argument drawn from the caſe of *Lickbarrow* v. *Maſon* is unfounded; for there the holder of the bill of lading indorſed to him by the conſignee of the goods was allowed to prevail againſt the claim of the conſignor, not merely becauſe he was a third perſon in the tranſaction, but becauſe the conſignor by putting it in the power of the conſignee to indorſe a negotiable inſtrument to a third perſon was himſelf a party to the contract with that third perſon, and becauſe the holder of the bill of lading in effect claimed under the conſignor as much as under the conſignee. Indeed Lord *Loughborough* in giving his opinion on that caſe in the Exchequer Chamber, 1 *H. Bl.* 363. ſays, "I ſtate it to be a clear propoſition that the vendor of goods not paid for, may retain the poſſeſſion againſt the vendee, not by aid of any equity, but on grounds of law." Could it be inſiſted for a moment that if *Negretti* and Co. had entered into an agreement with third perſons in the country that when theſe goods arrived they ſhould have them, thoſe third perſons would in conſequence of ſuch agreement have acquired a lien on the goods for money advanced by them paramount to the conſignor's right of ſtoppage *in tranſitú*? If this doctrine prevail, no perſon can ever ſend goods by a carrier until he has previouſly examined the carrier's books and aſcertained the extent of the conſignor's debts to the carrier. The caſe of *Dawes* v. *Peck* proceeded on the ground of a delivery to a ſpecial carrier. It is not to be denied that carriers may make a ſpecial contract with thoſe for whom they carry goods, and that notice to a party of ſuch uſage is evidence of an implied contract; but it is only evidence from whence a contract is to be implied and cannot be ſet up to defeat a lawful claim on any other ground. In the preſent caſe whatever may have been the underſtanding between *Negretti* and Co. and the Defendant, there is not the ſlighteſt evidence of the Plaintiffs having been acquainted with or aſſented to the Defendant's claim of a lien for his general balance.

Lens in reply obſerved that if theſe goods previous to their delivery to *Negretti* and Co. had been ſeized by the Sheriff under a *fi. fa.* in ſatisfaction of a debt due from them, the Plaintiffs could not by virtue of their right to ſtop *in tranſitú* have reclaimed the goods from the Sheriff, unleſs notice had been given to the Sheriff at the time he ſeiſed them of the Plaintiffs' claim.

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Lord ALVANLEY Ch. J. The question before the Court is, Whether the evidence which was offered at *Nisi Prius* was properly rejected considering for what purpose that evidence was adduced? This was an action brought by the Plaintiff as consignor against a carrier for the recovery of goods, and it is stated upon the case that the goods were demanded by the Plaintiffs before they either actually or constructively reached the hands of the consignee. According to the general rule the carrier under these circumstances was bound to deliver them and was liable, as Lord *Kenyon* very properly determined, to an action of trover if he did not deliver them. Though no act of seizure ensue, yet if tender be made of the sum due for the carriage, the person sending the goods has a right to resume them; and that was done in this case. The defence set up by the carrier is this. "It is very true I have not delivered the goods either actually or constructively into the hands of the consignee. I am a carrier and have not delivered them at the place of their destination; but I and the rest of my trade have established an usage which is evidence against all persons who make use of us as common carriers, which usage is that the person to whom goods are consigned shall not be entitled to take them out of the carrier's possession or bring an action for the non-delivery of them until he has paid not only for the carriage of those goods, but all the balance he may happen to owe for the carriage of other goods." Evidence was offered at the trial to prove this usage, in order to raise against the Plaintiff this defence, namely, that he was bound by this usage and that the carrier acquired as against him and his right of stopping *in transitu* the same right of detainer as against the consignee. I am now satisfied that I ought to have admitted that evidence for the purpose of proving the usage, if when proved it would be of any use: for whatever doubts I entertained at the trial I see that by an authority, to which I bow, it has been determined that this sort of usage may be adduced in evidence with a view of establishing in particular trades that sort of lien which I am sorry has of late years grown so much into fashion, and has I think been too much favoured. In *Kirkman* v. *Shawcross* it was published in newspapers and all the world were apprised that a particular class of traders, such as dyers, bleachers, &c. would not take any goods to be manufactured in a particular way unless subject to a general lien as against the person sending them. But there the person sending them

them was the perſon with whom the contract was made, and he had full knowledge of the uſage. Indeed I think there is a great diſtinction between that caſe and the caſe of a carrier or an innkeeper; in the former the trader may or may not take goods to bleach at his option and nobody can compel a man to bleach for him; therefore he who ſends goods to a bleacher ſends them upon an implied contract that his goods ſhall not be redemanded by him but upon payment of the bleacher's general balance. I was of opinion that though that evidence of uſage might be admiſſible in that caſe, it was inadmiſſible in this caſe, becauſe if proved it would not affect the conſignor's lien, and I am of that opinion ſtill; and if I or my brothers had any doubts upon it we would comply with what has been ſuggeſted at the bar, namely, agree to put this caſe in a ſhape in which the queſtion might be finally determined; but as we have no doubts at preſent and as it is a caſe of little conſequence in point of value, we ſhall in the preſent ſtage deliver our opinions, and if the parties are deſirous of having this point more ſolemnly determined, they may bring it forward in a caſe of more importance. We are called upon to ſay that this uſage ſet up by the carriers on the weſtern road ought in point of law to prejudice that right which is now as firmly ſettled and as much a legal right as any other; namely the right of a conſignor who has delivered goods to a common carrier to reclaim thoſe goods before they have come into the actual or conſtructive poſſeſſion of the perſon to whom they are addreſſed. I confeſs I thought the propoſition a monſtrous one when firſt ſtated; and I ſtill think it impoſſible to maintain that an agreement between the conſignees of goods and the carriers upon the weſtern road can put an end to the right of ſtopping *in tranſitû* veſted in the conſignors of goods before that agreement exiſted. It was admitted that if the conſignee had made an aſſignment of the goods, his aſſignee could not have defeated the rights of the conſignor. Then if he could not do it by aſſignment how can he by any agreement with the carrier? for the carrier comes in under the conſignee. In the argument the rights of third perſons were puſhed forward: and moſt unqueſtionably they cannot be affected by the right of the conſignor to ſtop *in tranſitû*; for if by any thing that had happened to the goods where they were depoſited any perſon had acquired a right in thoſe goods before they became the property of the conſignee, the conſignor could not have reſumed them without ſatisfying that right; but he can reſume them without

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satisfying any rights derived under the consignee, if he claim to resume them before they come into that situation which gives the consignee a complete dominion over them. Perhaps there is a little difficulty in stating the several rights of consignor and consignee. It has been determined that the moment goods are delivered by *A.* to a common carrier to be by him forwarded to *B.* the property vests in *B.*, and if they are lost he, not the consignor, is the person to bring an action for that loss. This it was contended decides the present point. But we must recollect that though the property be in the consignee still it is liable to be divested by the consignor under certain circumstances, and when the right of resumption is exercised by the consignor the property is revested in him. Though the consignee be the person who must sustain any loss happening to the goods and therefore the carrier is principally his agent, still he is so far the agent of the consignor, that the law has said, the consignor has a right to take the goods out of the hands of the carrier at any time before delivery to the consignee. My brother *Lens* put a case which I do not think so clear as he seemed to consider it, namely, that if the Sheriff had found these goods upon the road and seized them under a *fi. fa.* in satisfaction of a debt due from the consignee to a third person, the consignor's claim to resume the property after such a seizure could not have availed him. Whether the Sheriff can make them absolutely the goods of the consignee by stopping them before they come to his hands, appears to me very doubtful. At any rate that is not the present case. Here neither the consignee nor any body claiming under the consignee had attempted to reduce the goods into actual possession before the claim of the consignor. They remained therefore in the hands of the carrier in the same state as when they were first delivered. There is no evidence whatever in this case of the consignor having had any actual notice that this Defendant as a carrier would take no goods but what were liable to this new lien. Indeed my own opinion at present is that he had no right to make such terms with the consignor, and I hope it will never be established that common carriers who are bound to take all goods to be carried for a reasonable price tendered to them may impose such a condition upon persons sending goods by them. Then the single question in this case is, whether a stipulation between the consignees and carriers on the western road that the latter shall retain as against the former for

their general balance can take away that common law right which is now firmly eſtabliſhed, namely, that till goods have reached either the actual or conſtructive poſſeſſion of the conſignee the property in them may on certain events revert back to the perſon by whom they were delivered into the hands of the carrier? The carrier's claim here is in contravention of that right; for there is no third perſon to whom any right is derived from the conſignor. With reſpect to the argument adduced from the deciſions in favour of indorſees of bills of lading, it is to be obſerved that in thoſe caſes the conſignor himſelf had enabled the conſignee to raiſe money upon his goods, and it would have been monſtrous to permit the conſignor after a credit obtained by means of his own bills of lading to take the goods out of the hands of an aſſignee in fact claiming under himſelf. Under theſe circumſtances therefore I am of opinion that the evidence offered was not admiſſible for the purpoſe for which it was offered.

HEATH J. I am of the ſame opinion, and I found my judgment upon a few principles which I think ſteer clear of moſt of the caſes cited. In the firſt place it is clear I think that the right of ſeizing *in tranſitû* by the conſignor is a common law right; and that it is ſo is evident, becauſe it may be the foundation of an action of trover. In the next place I think it is a right ariſing out of the ancient power and dominion of the conſignor over his property, which at the time of delivering his goods to the carrier he reſerves to himſelf. Then the third principle I ſhall lay down is this, without impeaching any of the caſes which have been adjudged, that there is a certain privity of contract between the conſignor and the carrier; and it is evident that there is that privity of contract from this conſideration, that if for inſtance the conſignee has run away and cannot be found, or if the conſignee will not take to the goods, but will ſay "I did not order theſe goods," or "I countermand them and will not accept them," in either of theſe caſes the carrier may come upon the conſignor for the carriage of the goods, which he could not do unleſs there was a privity of contract between him and the carrier. Then if this is a power reſerved out of the ancient dominion the conſignor has over his property, it is paramount to any ſort of agreement as between the carrier and conſignee. As I put the caſe juſt now, ſuppoſe the conſignee is not to be found to receive the goods, could the carrier in ſuch a caſe ſay "there is a running account between

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me and the conſignee, and therefore I will make you the conſignor pay the conſignee's balance?" Certainly he could not. But if it was in the power of a carrier to create this lien, which I very much doubt as well as my Lord, he might ſay to the conſignor "you owe me money upon another account, and you ſhall not have theſe goods unleſs you pay me as well for the carriage of theſe goods as for the running account between us in reſpect to the other goods." It is unneceſſary for the Court at this time to deliver any opinion concerning the legality of this lien, or how far it may properly operate, but I think it is an extremely doubtful matter for the reaſons my Lord has given.

ROOKE J. This right to ſtop the goods *in tranſitu* I muſt conſider as a legal right. Our courts of common law recogniſe it, and they diſtinguiſh between the conſtructive and the actual delivery of goods. This diſtinction is mentioned by Mr. Juſtice *Buller* in delivering his opinion in the caſe of *Ellis* v. *Hunt*. Where there is an actual delivery the *tranſitus* is at an end, but where the delivery is conſtructive or fictitious, there the law conſiders that as a delivery to certain purpoſes only; for it is a fiction of law, and that fiction of law muſt work equity. Now the fiction is this, that it is a delivery ſo far as to make the carrier anſwerable to the conſignee, to whom he has undertaken to carry them; but the fiction is never carried ſo far as to deprive the conſignor of his right to reſume them, if ſtopped before they have actually got to the poſſeſſion of an inſolvent conſignee. This is an equitable and juſt right. But I can never aſſent to a doctrine ſo diſcreditable to our courts of law as that, becauſe it is equitable and juſt, that it is therefore not ſtrictly legal. Though a juſt and equitable right, it is a legal right too, and not a right which needs the aid of a court of equity. Then, what is the claim ſet up by the Defendant? It is a claim founded on a ſpecial agreement only. I call it a ſpecial agreement for this reaſon, that it is not founded on general principles of juſtice, but on particular uſage. That uſage is preſumed to have been founded on contracts repeated ſo frequently and ſo notorious, that every body muſt be conſidered as bound to take notice of it. Suppoſing it therefore to be any right at all, it is a right founded only upon this ſort of ſpecial agreement. If indeed it was a claim founded upon general principles of univerſal juſtice, it ought to be the law of the land, and we ſhould not want any evidence of that which is agreeable to

law and juſtice. The very circumſtance therefore of admitting evidence in this caſe ſhews, that it is not founded on univerſal right, but on ſpecial uſage only. The contract itſelf is a very ſingular one: for generally ſpeaking carriers have extricated themſelves from the rules of law by making ſpecial acceptances. Now we know that a ſpecial acceptance can only be made with the conſignor or his ſervant when he brings the goods: it cannot be made with the conſignee. Nor can the conſignor agree that the conſignee ſhall not take the goods until he ſhall have paid the general balance; for in order to make ſuch an agreement he muſt delay ſending the goods until he could receive an anſwer whether the conſignee would conſent to it. It is therefore, to ſay no more of it, a very extraordinary caſe. It is not likely that the conſignor would wave his own right of ſtopping *in tranſitu*, when the ſpecial acceptance was required of him: and the ſpecial agreement of the conſignee ought not to bind the conſignor's right of ſtopping *in tranſitu*. Then with reſpect to the uſage itſelf as laid down, my Lord has made an obſervation very material in my view of the queſtion, which is, that a carrier is bound to carry at all events, and the law gives him a ſpecial lien upon the goods. If the conſignee is in arrear with the carrier, it is the carrier's own *laches*. Why then is he to engraft this new lien upon his own *laches*? However, if he chooſe to do it, and can eſtabliſh the principle upon which it proceeds (to which I am by no means ready to aſſent) ſtill it will be founded only on a ſpecial agreement. Now I rather think that the practice has originated thus. The carrier has carried goods to the conſignee, and has refuſed to deliver them unleſs he has been paid a general balance; the anſwer made by the conſignee has been, "Rather than have two actions I will pay the demand," for he muſt himſelf bring an action in order to recover the goods from the carrier, and then the carrier would have an action againſt him for the general balance; and rather than ſubmit to two actions, conſignees have ſuffered ſuch a uſage as this to creep in; and having done it in ſeveral inſtances, the carriers have availed themſelves of it, and have publiſhed their hand-bills about town, and now they endeavour to ſet it up as an univerſal uſage; but it is to be remembered, that this is an uſage founded ſolely on their own *laches*, for they have a lien by the law of the land for the carriage of the goods. At all events however it is nothing more than a ſpecial contract between the carrier and conſignee: and if it be a ſpecial contract on their

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parts, how is that ſpecial contract to interfere with the legal right allowed to the conſignor of ſtopping *in tranſitu*? I think the common law right of the conſignor is paramount, and it ſhall not be affected by a ſpecial agreement between the conſignee and the carrier, even ſuppoſing that ſuch an agreement could be eſtabliſhed. This I ſay without giving a direct opinion whether that agreement may or not be eſtabliſhed by evidence. Then the queſtion directly before the Court is, Whether a new trial ſhould be granted becauſe the evidence has not been received? If it were a queſtion merely as between conſignee and carrier, to be ſure this evidence ſhould have been received, and then the Court would have had to decide upon the legality of this ſpecial uſage between the parties: but if it cannot affect the right of third perſons it was uſeleſs to receive it; and being uſeleſs in this caſe, I am of opinion with my Lord Chief Juſtice and my brother *Heath* that no new trial ſhould be granted.

CHAMBRE J. I think this modern doctrine of altering the liability to which the common law ſubjects parties and veſting in them new rights by preſumed agreements ariſing from the publication of certain notices, has been extended as far or rather farther than it ought to be upon principles of public policy. If the doctrine were to be carried the length which was intimated when this rule was firſt applied for, the conſequences would be monſtrous; but that a notice publiſhed by carriers in hand-bills or in the public papers is to ſubject the goods of every man who happens to employ a carrier to the payment not only of the price of the carriage or to any debt which he himſelf may owe on the ſcore of carriage to that carrier, but to the debts of another man is ſo manifeſtly unreaſonable and ſo monſtrous that I think no legal agreement can be implied from ſuch a notice. Indeed that point ſeems now to be pretty much abandoned, and the right which the carrier claims in this inſtance he endeavours to derive from the conſignee himſelf. It is going a good way to bind even the conſignee of goods by an agreement of this kind: for goods may be ſent without his chooſing any carrier or directing by whom they are to come. He orders goods generally and yet he is to be bound by an implied agreement with a particular carrier who happens to bring thoſe goods. But it is not material to conſider that queſtion at all in this inſtance; the merits of this particular caſe have been ſo fully entered into by my Lord and my brothers, who

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who have already ſpoken, that I ſhall be very ſhort in what I have to obſerve upon this ſubject. I will take it for granted upon this occaſion (though perhaps it is not very fully proved) that the delivery to the carrier was to all intents and purpoſes a delivery to the conſignee, that is a qualified not an abſolute delivery, but that ſort of delivery which would entitle the conſignee to have brought his action againſt the carrier for the loſs of his goods, and is a good delivery to all intents and purpoſes excepting that of defeating the right of the conſignor to ſtop *in tranſitû*. In the caſes which have been decided, particularly in the laſt caſe in the Court of *King's Bench*, there has been what the Court conſidered as a ſpecial direction with reſpect to the carrier who was to bring the goods. The Court ſeemed to conſider that as a delivery under the ſpecial order of the conſignee, and the deciſion goes a good deal upon that ground. But I would ſuppoſe upon this occaſion that as the goods muſt come by land carriage it was ſufficient to deliver them to any carrier coming from the place from whence the goods were ordered, and that there was a complete delivery to the conſignee; that is, ſuch a delivery as I before ſtated. Now it is contended on the part of the carrier, firſt of all that this right of ſtopping *in tranſitû* is a right in equity. I do not know what is meant by that argument. If it be a right in equity every thing done in Courts of Law to enforce this right has been wrong. It is argued indeed that it is a legal right founded upon equitable principles; but that does not ſeem to be a very preciſe definition of the right. Then it is contended that this right is not to affect the right of third perſons. No propoſition can be more true, but is it true that it does affect the right of third perſons? It is ſaid that the conſignee has notice of the conditions upon which the carrier received the goods; be it ſo; but in that caſe the carrier muſt derive his right from that conſignee. Can he have a greater right than the conſignee himſelf has? if he derive his right from the property he ſuppoſes to be veſted in the vendee he can have only a ſimilar intereſt in the property with the vendee. It is beyond all queſtion that the carrier has a lien for the labour that he has beſtowed as againſt the conſignor in the carriage of the particular goods; that lien is ſatisfied, the money having been tendered to him and he having refuſed to accept it. Now what pretence is there to go farther, even if it were admitted that by publications of this ſort carriers could affect the conſignor? I do not

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think the notice publiſhed upon this occaſion goes the length of affecting the conſignor beyond that lien which the carrier has for the carriage of the particular goods. The notice is only in general terms that the goods ſhall be ſubject to the general balance due from the reſpective owners. If we take it to be a lien upon the general balance due from the conſignor, there is no pretence for any lien beyond the carriage of theſe particular goods. Taking it to be a lien for the general balance due from the conſignee, then it can only be a lien ſubject to the right of the conſignor to ſtop the goods *in tranſitû* in conſequence of the inſolvency of the conſignee. This caſe has been compared to the caſe of the conſignment of a bill of lading. To be ſure two caſes can hardly be ſtated more diſſimilar. A conſignee by a bill of lading receives what is conſidered as a kind of negotiable intereſt and for a valuable conſideration; here there is no conſideration to the conſignor for extending the lien. A conſignee of a bill of lading may for a valuable conſideration negotiate that inſtrument. Whence does that ariſe? From the uſage and cuſtom of merchants. Where is the uſage and cuſtom reſpecting the trade of a carrier to authoriſe this lien? In the former caſe there is an inſtrument under the hand of the conſignor himſelf, and the conſignee acts as his agent in the diſpoſition of the property: it is an aſſignment by the conſignor himſelf. The moſt colourable argument in my mind that has been uſed upon this occaſion is that which was not mentioned till the reply, comparing this caſe to the caſe of a creditor of the conſignee taking goods in execution upon their paſſage. It is aſſumed that the creditor has that right, but if he has it I ſtill do not think that the caſes are ſimilar. Perhaps the conſignee himſelf may intercept the goods in their paſſage, and indeed I have little doubt but that if he do intercept them in their paſſage before the conſignor has exerciſed his right of ſtopping *in tranſitû* and do take an actual delivery from the carrier before the goods get to the end of their journey, that ſuch a delivery to him will be complete, and I will not ſay but that his creditors in the caſe of an execution againſt him for his goods may not do the ſame thing. No authorities however are cited to prove that they may. But ſuppoſing that they may, ſtill I do not think it applies to this caſe, for the creditor under an execution takes the thing abſolutely to ſell and diſpoſe of as the conſignee himſelf would have done; but the carrier does not ſo take it, for he

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he has no abſolute property in the goods but only a lien. What is the nature of the poſſeſſion of a carrier? He has no abſolute right in the property, he has only a lien. Then the queſtion returns, What is the nature of the carrier's lien while the goods are *in tranſitû*? I conceive his lien cannot, as againſt the conſignee, extend any further than to entitle him to be paid for his carriage of the particular goods, but by the lien the right of the conſignor to ſtop the goods *in tranſitû* is not defeated. For theſe ſeveral reaſons and for thoſe which have been urged by my Lord and my brothers who have ſpoken before me, I am perfectly well ſatisfied that the judgment in this caſe ſhould be given for the Plaintiffs. As to the rejection of the evidence the only uſe that could have been made of that evidence would have been to prove that as againſt the conſignee the carrier had a lien.

Judgment for the Plaintiffs.

EAGLETON *v.* The EAST INDIA COMPANY.

Feb. 10th.

The ſale of the *E. I.* Company being ſubject to a regulation that any buyer not making good the remainder of his purchaſe money on or before the day limited for ſuch payment ſhould forfeit the depoſit, and ſhould be rendered incapable of buying again at any future ſale, it he ſhall have given *ſatisfaction* to the Court of Directors;" Held that the term *ſatisfaction* muſt be conſtrued to mean pecuniary compenſation for the non-performance or his agreement to pay on the appointed day, and that a buyer having made default on the day, but afterwards within a further time given to him by the *E. I.* Company paid the remainder of the purchaſe money with intereſt, might maintain an action againſt the *E. I.* Company for refuſing to allow him to become a bidder at their ſales, ſuch ſales being by 9 & 10 *W.* 3. *c.* 44. *ſ.* 69. declared to be public and open ſales.

Quære, Whether ſince the paſſing of 18 *Geo.* 2. *c.* 26. which regulates the depoſits, forfeitures, and incapacities of bidders at the tea ſales of the *E. I.* Company, the *E. I.* Company can make or enforce any other regulations affecting thoſe ſales than ſuch as the act of Parliament has enacted?

THIS was a ſpecial action on the caſe brought by the Plaintiff to recover damages againſt the *Eaſt India* Company for refuſing to declare him the beſt bidder for certain teas put up to public ſale by the Company, and for refuſing to accept the depoſit upon ſuch biddings, or to ſell him the ſaid teas.

The firſt count of the declaration ſtated, that the Plaintiff had for a long time carried on the trade of a tea-dealer, and as ſuch had been uſed to bid for and buy large quantities of tea at the public ſales of the *Eaſt India* Company, and to ſell the ſame again to his cuſtomers, and thereby to gain great profit; that he was lawfully entitled to become ſuch bidder and buyer, and that on the 17th of *June* 1801, the *Eaſt India* Company had a public ſale of tea by inch of candle, and the plaintiff did bid for divers

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lots, to wit, &c. (ſetting out the lots) and became the beſt bidder for the ſame, and that the *Eaſt India* Company of right ought to have declared him the beſt bidder; but that they well knowing the premiſes, and intending to injure him, refuſed to declare him the beſt bidder for the ſame, or to ſell the ſame to him, but ſold them to other perſons to him unknown; and although the Plaintiff at the time when according to the form of the ſtatute in that caſe made and provided the depoſits upon the teas ſold at the ſaid ſale ought to have been made to wit, on, &c. tendered to the *Eaſt India* Company his depoſits in that behalf, to wit, at, &c. they refuſed to receive the ſame. The ſecond count was in the ſame form as the firſt, but related to different lots; and was followed by an allegation of ſpecial damage, ſtating, that by reaſon of the premiſes the Plaintiff was deprived of the teas, and of great advantage which would have ariſen to him in caſe the *Eaſt India* Company had ſold them to him as of right they ought to have done, and was prevented from carrying on his trade in as beneficial a manner as he might otherwiſe have done. The third count was for refuſing to declare him the beſt bidder for other lots of teas, or to ſell the ſame to him. The fourth and fifth counts were for refuſing to ſell other lots to the Plaintiff, for which he had become the beſt bidder. And the ſixth count was in trover for 500 cheſts of teas.

The Defendants pleaded the general iſſue—Not Guilty.

The cauſe came on to be tried at the *Guildhall* Sittings after laſt *Trinity* term before Lord *Alvanley* Ch. J. when a verdict was found for the Plaintiff, damages one ſhilling, ſubject to the opinion of the Court upon the following caſe:

The Plaintiff is a tea dealer and a ſubject of *Great Britain*, and as ſuch accuſtomed to bid for and buy teas at the public ſales of teas of the *Eaſt India* Company, and to ſell the ſame again in the courſe of his trade. The *Eaſt India* Company having put up teas for ſale in the manner ſtated in the declaration, the Plaintiff was the beſt bidder at thoſe ſales for the teas ſpecified in the declaration. The *Eaſt India* Company refuſed his biddings, or to ſell him the teas, and the ſame were ſold to other perſons. The Plaintiff tendered the depoſits as ſtated in the declaration, and the *Eaſt India* Company refuſed to accept them. At the ſales to which the declaration relates, and at all previous ſales as far back

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as before the paſſing of the 18 *Geo.* 2. *c.* 26. conditions of ſale had been publiſhed as follows, *viz.*

The United Company of Merchants of *England* trading to the *Eaſt Indies* do hereby declare, that the goods by them put up or expoſed to ſale during the continuance of this preſent ſale, are ſo expoſed by them to ſale upon the terms hereinafter mentioned, and upon ſuch other terms as ſhall be expreſſed in the catalogues; and every reſpective buyer is to take notice, that whatever goods he ſhall buy or contract for at the preſent ſale, the ſame and his contract relating thereto, are to be ſubject to the terms, conditions, and agreements hereafter declared, and to ſuch other terms, conditions, and agreements, as ſhall be expreſſed in the catalogue of ſuch goods. (Here followed the conditions of ſale at length, the material parts of which were theſe). " And in caſe any buyer or buyers of goods, tea excepted, which is provided for by act of Parliament, ſhall make default in payment of his or their depoſit, the goods ſhall be as ſoon after as convenient reſold, and the difference in price, if any, and expences be made good by the firſt purchaſer, who ſhall alſo be rendered incapable of buying again at the Company's candle. And in caſe any buyer ſhall not make good the remainder of the purchaſe-money on the goods which ſhall be bought by him on or before the day limited for payment thereof, the depoſits which have been paid upon the ſame ſhall be forfeited to the Company, and ſuch buyer ſhall be rendered incapable of buying again at any future ſale, until he ſhall have given ſatisfaction to the Court of Directors. Such perſon or perſons as cannot make themſelves known to the Court of Directors' ſatisfaction, or to the major part of the Directors preſent at this ſale, ſhall forthwith make a further depoſit to ſuch amount as ſhall be required by the Directors in part of payment for the goods by him or them bought; and in default thereof ſuch perſon or perſons ſhall not be nor be allowed to be a buyer or buyers of any goods at this ſale."

At ſome ſales previous to thoſe mentioned in the declaration, and after the publication of the above conditions, the Plaintiff had been declared the beſt bidder upon many lots, and had paid his depoſits upon thoſe ſales agreeably to the acts of Parliament and conditions above mentioned, but had neglected to make good the remainder of the purchaſe-money on the goods which he had ſo bought. On application being made to the *Eaſt India* Company,

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they did not inſiſt on the forfeiture of the depoſits, but gave the Plaintiff time to pay the remainder of the purchaſe-money on the ſaid goods. The Plaintiff afterwards paid the purchaſe-money with intereſt within the time ſo given: but the *Eaſt India* Company at the time of waving the forfeiture of the depoſits, and giving the Plaintiff time as aforeſaid, and receiving the payment as aforeſaid, declared to the Plaintiff that he ſhould not be permitted to bid at any future ſale, until he made ſatisfaction to the Company, which he hath never done, nor agreed to do, being determined to contend that the condition was illegal; the Plaintiff was in conſequence of ſuch non-payment forbidden the ſales of the Company, and his name as a defaulter ſo forbidden was declared in the uſual and accuſtomed manner. The Plaintiff was not in arrear to the *Eaſt India* Company at the time of the biddings and refuſals mentioned in the declaration.

The queſtion for the opinion of the Court was whether the Plaintiff was entitled to recover?

Beſt Serjt. for the Plaintiff. The point ariſing upon this caſe is of the greateſt magnitude, ſince it involves this important queſtion Whether the whole produce of the *Eaſt Indies* be under the abſolute control of the *Eaſt India* Company? It is the policy of the law of *England* to look upon all monopolies with a jealous eye; and there never was any monopoly which ſtood ſo much in need of ſalutary reſtraint as that of the *Eaſt India* Company on account of its enormous extent. By the 9 and 10 *Will.* 3. *c.* 44. *ſ.* 69. it is provided, that all goods of the Company imported into *England* ſhall be ſold publicly and openly by inch of candle upon pain of forfeiting the ſame; and by the charter of the 10 *Will.* 3. granted in purſuance of the ſaid act, the anxiety of government is ſtrongly ſhewn to prevent any abuſe of the monopoly thereby granted, ſince it is by that charter expreſsly required and commanded that all goods imported by the Company ſhall be openly and publicly ſold by inch of candle purſuant to the ſaid act upon pain of incurring the King's higheſt diſpleaſure. Without this proviſion the Company would have been enabled to exerciſe their monopoly to the prejudice of the community, by exacting exorbitant prices for their commodities. But it having been deemed expedient to veſt the right of trading to the *Eaſt Indies* in the Company, to the excluſion of all the other ſubjects of the King, it is provided as a compenſation for this excluſion that every ſub-

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ject ſhall have a right to purchaſe the commodities imported by the Company at public and open ſale. By the act of Parliament therefore a right is veſted in every ſubject of the realm to purchaſe at the Company's ſales, which right no authority inferior to that of Parliament can diveſt. If then no power but that of Parliament can take away this right, no other power can abridge it: conſequently the article in the conditions of ſale, which excludes every perſon from the right of bidding who has once failed in completing a purchaſe made by him at any former ſale, is abſolutely void. It may be ſaid that the direction of the ſtatute to ſell by auction implies a power to impoſe regulations. But a regulation conſiſts in aſcertaining the mode in which a thing is to be done, whereas theſe conditions exclude certain perſons from doing the thing at all. If a merchant import goods the King may refuſe to ſuffer him to land his goods until he has paid the cuſtoms; but the King cannot make an order, that if any merchant once land goods without paying the cuſtoms he ſhall for ever be forbidden to land any more; and yet what the King could not do in that caſe, the *Eaſt India* Company ſeek to do in this. Neither can the Company be compared to a private individual ſelling goods by auction, to whom it is competent to inſert in his conditions of ſale that ſuch and ſuch perſons ſhall not be allowed to bid; for a private individual may refuſe to ſell at all, whereas the Company are bound both by their charter and by act of Parliament to ſell by public and open ſale. It may be collected from ſeveral acts of Parliament ſubſequent to the 9 and 10 *Will.* 3. that the Legiſlature did not underſtand any ſuch power as that which has been exerciſed by the Company to be veſted in them. It is ſtated in the caſe that the article in queſtion was publiſhed in the conditions of ſale as far back as before the ſtatute 18 *Geo.* 2. *c.* 26. Now the 7th ſection of that act, after reciting that many perſons bid for tea at the ſales of the Company without intending to pay for the ſame unleſs the price ſhould riſe, enacts, that all perſons who become the beſt bidders ſhall make a depoſit of 40*s.* for every tub and cheſt of tea within three days, on pain of forfeiting ſix times the value, and declares, that all perſons neglecting to make ſuch depoſit ſhall thereafter be incapable of bidding at the Company's ſales. Had the Company been empowered to make ſuch a condition, the interference of the Legiſlature on this occaſion would have been unneceſſary; but the inference to be drawn from this legiſlative

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regulation is, that the terms inſerted by the Company in their conditions were thought improper, but that ſome reſtrictions being neceſſary, the Legiſlature adopted that which is ſtated in the act. The 13 *Geo.* 3. *c.* 44. *ſ.* 2. which introduces a ſimilar regulation with reſpect to Bohea tea affords a ſimilar ground of argument. With reſpect to theſe two acts, indeed it may be ſaid that they are revenue acts; and not being made with a view to the intereſt of the Company, afford no ſufficient ground to argue againſt the power of the Company to have made the ſame regulations. But this obſervation does not apply to the 33 *Geo.* 3. *c.* 52. *ſ.* 161. in which the two former acts are recited, and the times of paying the depoſits are regulated. Perhaps it may be argued, that unleſs this regulation were eſtabliſhed, an inſolvent perſon might become the beſt bidder at the ſales; but it having already been provided by act of Parliament that the beſt bidder ſhall make a depoſit, that circumſtance is ſufficiently obviated: at leaſt it is not competent to the Company to ſay that the proviſions of the Legiſlature are inadequate to the purpoſe for which they were made. Even ſuppoſing that theſe conditions of ſale could be conſidered as a by-law they would be void for many reaſons. Firſt they are a reſtraint upon trade; ſince they do not only regulate the manner in which the trade ſhall be carried on, but in certain caſes reſtrain perſons from carrying it on at all. Thus in *Harriſon* v. *Godman*, 1 *Burr.* 12. a by-law of the City of *London* obliging all butchers though free of the city to become members of the Company of Butchers was holden bad. So it is ſaid 1 *Bl. Comm.* 476. that a trading Company cannot make a by-law againſt the common profit of the people: and in *Com. Dig.* tit. *Trade D.* 2. that a by-law for the total reſtraint of trade is bad. Secondly, a by-law to exclude a perſon altogether from the exerciſe of a legal right is void. Thus it is ſaid, in the Chamberlain of *London*'s caſe, 3 *Leon.* 264. that although a commoner may be obliged by a by-law to exerciſe his common at certain times only, yet a by-law to exclude a commoner from his common is bad. And in *Rex* v. *Spencer*, 3 *Burr.* 1827. a by-law reſtraining the perſons entitled to elect common-council-men, to ſuch of the commonalty as had executed parochial offices, the right of election having previouſly been veſted in all the commonalty, was declared to be void. Thirdly, a corporation cannot bind any by a by-law but its own members. Therefore a by-law made by the Univerſity of *Oxford* ſhall not bind a townſman; *Dodwell* v. *The*

University of Oxford, 2 *Vent.* 33. It may perhaps be contended however that the plaintiff by bidding at the ſales of the *Eaſt India* Company has contracted to purchaſe upon the terms publiſhed by the Company; but in anſwer to this it may be obſerved, that a contract entered into by any one reſtraining him from exerciſing his trade altogether is void. *Thomſon* v. *Harvey*, 1 *Show.* 2. and *Mitchell* v. *Reynolds*, 1 *P. Wms.* 187. Now the preſent Plaintiff cannot carry on his trade otherwiſe than by purchaſing the commodity in which he deals at the ſales of the *Eaſt India* Company. At any rate the terms impoſed by the Company ought to be plain and unequivocal, and ſuch as leave no diſcretion in the Company, becauſe the forfeiture to be incurred may otherwiſe be made an engine of oppreſſion on particular individuals inſtead of a wholeſome regulation of the trade. Indeed no preciſe meaning or definite idea can be affixed to the terms "giving ſatisfaction," uſed in theſe articles of ſale, and the preſent caſe ſtrongly ſhews the uncertainty they involve, ſince though it is admitted that the Plaintiff has paid all the money which was owing to the Company, together with intereſt for the time from which he made default, ſtill he is ſtated not to have made ſatisfaction to the Company. In a court of law however no other ſatisfaction than pecuniary ſatisfaction can be contemplated; and the Plaintiff having made that ſatisfaction, has fully complied with the terms of ſale whether legal or illegal, which the *Eaſt India* Company have thought fit to impoſe.

Bayley Serjt. for the Defendants. Though the *Eaſt India* Company are bound by the 9th and 10th *W.* 3. to ſell all goods imported by them by public and open ſale to the beſt bidder, yet they are not precluded from impoſing ſuch conditions and regulations as they find neceſſary for their own ſecurity. Indeed conſidering the extent to which theſe ſales are carried on, and that the Company are bound to convert all their funds into money by theſe means for the purpoſe of ſatisfying the claims of their creditors, their proprietors, and of government, it is highly neceſſary that ſuch regulations ſhould be impoſed as will inſure the completion of thoſe purchaſes for which any perſon may bid at their ſales. The very obligation to ſell by public ſale implies a power to regulate that ſale in ſuch way as ſhall be found moſt convenient. There is a manifeſt diſtinction between a condition of ſale excluding a trader on account of ſome act done by him previous to the ſale, and a condition excluding him for ſome act

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done either at or after the ſale of the conſequences of which he was fully appriſed before the time of ſale. Previous to the 18 *Geo.* 2. no objection could be raiſed to theſe conditions, and as they have exiſted without objection from that time to the preſent it affords a ſtrong argument that they are reaſonable. Indeed the Legiſlature thinking theſe regulations not ſufficiently effectual, by the 18 *Geo.* 2. impoſed new regulations of ſale carrying the conditions further; and neither that ſtatute, nor the 13 or 33 *G.* 3. interfered to render void theſe articles of ſale impoſed by the Company, though at the time when theſe acts paſſed for the regulating the ſales of the *Eaſt India* Company, theſe articles were in full force. It muſt be inferred therefore that the Legiſlature approved them. With reſpect to the diſcretion veſted in the Company by the general term "ſatisfaction" uſed in the articles of ſale, it may be obſerved that ſuch diſcretion was neceſſarily given to the *Eaſt India* Company in order that they might be able to relieve from the rigour of the condition ſuch individuals as had incurred the forfeiture not by any fault of their own, but by unforeſeen circumſtances, and were therefore deſerving of relief; at the ſame time leaving to them the power of excluding from their ſales ſuch perſons as had wilfully and with improper views offended againſt the regulations. In this view of the ſubject the term "ſatisfaction" no longer remains ambiguous, and may well be conſtrued to be that ſatisfaction which ariſes not from a pecuniary compenſation, but from a fair and reaſonable excuſe offered for a conduct on the part of the bidder capable of being very injurious to the intereſts of the *Eaſt India* Company.

Cur. adv. vult.

The opinion of the Court was this day delivered by,

Lord ALVANLEY Ch. J. This caſe of *Eagleton* v. *The Eaſt India Company* ariſes out of an injury alleged to have been ſuſtained by the Plaintiff in having been prevented from doing that to which he claims a right, namely to become a bidder at the public ſale of the *Eaſt India* Company. The caſe is ſhortly this. By an act of the 9th and 10th *William* 3d, which was paſſed ſoon after the inſtitution of the *Eaſt India* Company and the granting of that monopoly which they ſtill poſſeſs, it was enacted, "That all goods and merchandizes belonging to the Company to be erected as aforeſaid, or any other traders to the *Eaſt Indies*, and which ſhall be imported into *England* or *Wales* as aforeſaid purſuant

ſuant to this act ſhall by them reſpectively be ſold openly and publicly by inch of candle upon their reſpective accounts and not otherwiſe." It ſeems that the Legiſlature at the ſame time that they gave a monopoly to the *Eaſt India* Company, thought it neceſſary (as it certainly was) to ſecure to the ſubjects of this country a free and equal opportunity of becoming bidders at public ſales of thoſe commodities which the *Eaſt India* Company alone for a time could import. The neceſſity of ſuch a regulation was obvious; otherwiſe it would have been in the power of the *Eaſt India* Company to have preferred themſelves and their friends; and in ſhort to have ſecured to themſelves all the benefits of a monopoly, and to have excluded the ſubjects of this country from thoſe advantages to which they were entitled. The regulation therefore appears to me to have been founded in neceſſity and to be ſuch a regulation as the laws of this country will ſee ſtrictly enforced. Notwithſtanding this proviſion however it appears to me abſolutely neceſſary that the *Eaſt India* Company ſhould be armed with powers to make regulations reſpecting thoſe ſales. All that the act requires is that they ſhall be fair and impartial public ſales; it does not define under what terms and regulations thoſe ſales ſhall be conducted, only that it ſhall be public ſales by inch of candle, that is to ſay, public ſales at which the beſt bidder ſhall be the purchaſer and open to all his Majeſty's ſubjects; and provided that object is obtained the *Eaſt India* Company are certainly at full liberty to make ſuch reaſonable regulations reſpecting the ſame as ſhall be neceſſary to make them effectual. A ſale by public auction does not *ex vi termini* require that any depoſit ſhould be made or any time given to the purchaſer; it might have been competent for the *Eaſt India* Company, if they had thought fit, to require that the purchaſer ſhould pay down the whole purchaſe money the moment that the bidding was declared; for there is nothing in the nature of an auction that requires any time to be given for the completion of the purchaſe. But for the accommodation of the public and the purchaſer it has always been found neceſſary that the payment of the whole money ſhould not be inſiſted upon; accordingly the *Eaſt India* Company (though at what time does not appear, and indeed if the judgment of the Court depended upon the time at which the regulations which are now in force were firſt made I ſhould deſire the caſe to be more accurately ſtated)

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framed thoſe regulations which are now acted upon. The caſe however ſtates that at ſome time before the paſſing of the 18 *Geo.* 2. the regulations under which the *Eaſt India* Company now act took place; but how long before the paſſing of that ſtatute we are not informed; all we learn is that theſe regulations had before that time been made by the *Eaſt India* Company, and the regulations as far as they relate to the preſent queſtion are theſe: "And in caſe any buyer or buyers of any goods (tea excepted which is provided for by act of Parliament) ſhall make default in payment of his or their depoſit the goods ſhall be as ſoon after as convenient reſold, and the difference in price, if any, and expences be made good by the firſt purchaſer, who ſhall alſo be rendered incapable of buying again at the Company's candle;" then they proceed, "And in caſe any buyer ſhall not make good the remainder of the purchaſe money on the goods which ſhall be bought by him on or before the day limited for the payment thereof, the depoſits which have been paid upon the ſame ſhall be forfeited to the Company, and ſuch buyer ſhall be rendered incapable of buying again at any future ſale until he ſhall have given ſatisfaction to the Court of Directors; and ſuch perſon or perſons as cannot make themſelves known to the Court of Directors ſatisfaction or to the major part of the Directors preſent at this ſale ſhall forthwith make a further depoſit, to ſuch amount as ſhall be required by the ſaid Directors in part of payment for the goods by him or them bought, and in default thereof ſuch perſon ſhall not be allowed to be a buyer of any goods." Now it is ſaid that with the exception of theſe words "tea excepted," which could not have been introduced before the ſtatute, ſimilar regulations had taken place and have ever ſince been continued; if that be ſo I am now to conſider what the Legiſlature could have meant when they paſſed the 18 *George* 2. ſuppoſing as the Counſel for the Defendants would wiſh us to ſuppoſe that they had before them at the time that they paſſed this act the regulations then ſubſiſting and affecting all things whatſoever; whether it was that the Legiſlature did not advert to any regulations; whether they took no cognizance of them, or whether they thought they were deficient we cannot tell; we have no judicial knowledge and we are not to conjecture. But we find that in 18 *George* 2. (a conſiderable time after the 10 *William* 3.) a new regulation took place;

whether the Legiſlature had or had not approved of the former regulations, or whether they thought the *Eaſt India* Company wanted authority to enforce thoſe regulations, we cannot tell; but for ſome reaſon or other, the Legiſlature thought fit not to leave the regulations reſpecting the article of tea to the *Eaſt India* Company but to make regulations themſelves and give the ſanction of the Legiſlature to them; and therefore it is enacted in theſe words, and they are well worthy conſideration: "Whereas many perſons do frequently at ſales for tea by the ſaid United Company bid for and are declared beſt bidders for large quantities of tea without intending or being able to pay for the ſame, unleſs ſuch teas ſhould after ſuch ſales riſe in price, by means whereof the prices of tea are frequently raiſed and the running of tea will be encouraged, for remedy thereof be it enacted, that every perſon who ſhall at any public ſale of tea made by the ſaid United Company be declared to be the beſt bidder ſhall within three days after being ſo declared the beſt bidder for the ſame depoſit with the ſaid United Company or their clerk or officer appointed for that purpoſe, forty ſhillings for every tub and for every cheſt of tea, and in caſe any ſuch perſon ſhall refuſe or neglect to make ſuch depoſit within the time before limited, he ſhall forfeit and loſe ſix times the value of ſuch depoſit directed to be made as aforeſaid, and the ſale of all teas for which ſuch depoſit ſhall be neglected to be made as aforeſaid, is hereby declared to be null and void, and all ſuch teas ſhall again be put up by the United Company to public ſale within fourteen days after the end of the ſale of teas at which ſuch teas were ſold, and every buyer who ſhall have neglected to make ſuch depoſit as aforeſaid ſhall be and is hereby rendered incapable of bidding for or buying any teas at any future public ſale of the ſaid United Company." Now if I had not been told by the caſe that there were already exiſting regulations which affected tea as well as all other articles, and which regulations had put it into the power of the *Eaſt India* Company to have effectually prevented any ſuch miſchief as the Legiſlature recites, I ſhould have ſuppoſed that miſchief to have been altogether without remedy. But it appears that the Company had before the 18 *Geo.* 2. a right to aſk what depoſit they pleaſed, and if they did not like the party to make him pay a further depoſit. However the Legiſlature did not think fit to truſt the Company with reſpect to this article of tea; and a very great queſtion ariſes,

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whether the 18 *Geo.* 2. has not put an end to any regulation reſpecting tea whatſoever; and whether as the Legiſlature has taken that entirely to itſelf, the *Eaſt India* Company are at liberty with reſpect to the ſubject of tea to make any further regulations? It is an extraordinary thing that the Legiſlature ſeeing the miſchief and being anxious to prevent it ſhould ſtop ſo ſhort. I do not mean to give it as my opinion that the 18 *Geo.* 2. does take away the power of the *Eaſt India* Company to make regulations after a depoſit has been made; but I think the beſt way would be to have recourſe to the Legiſlature to ſanction all their regulations as well with reſpect to tea as other articles of ſale and to put them upon ſuch a footing that there can be no miſtakes or miſapprehenſions in future. This being the caſe, and the regulations being made with reſpect to the excepted article of tea, I think a very great doubt may ariſe whether the latter part of the regulations relates to tea. Now this is an action for not being permitted to become a bidder for tea. If we look over the regulations, we ſhall find that when they come to ſpeak of the depoſit they ſay, "in caſe any buyer or buyers of any goods (tea excepted, which is provided for by act of Parliament) ſhall make default in payment of his or their depoſit, the goods ſhall be as ſoon after as convenient reſold, and the difference in price, if any, and expences be made good by the firſt purchaſer, who ſhall be rendered incapable of buying again at the Company's candle;" and then they go on with theſe words, "and in caſe any buyer." It is contended, that the word "buyer" there relates as well to the buyer of tea as other articles, notwithſtanding the exception. On that point I have great doubts, eſpecially when I come to read the third clauſe, which cannot poſſibly apply to tea, becauſe the Legiſlature have told the *Eaſt India* Company what depoſit they are to have for tea; and the third regulation is "That ſuch perſon or perſons as cannot make themſelves known to the Court of Directors ſatisfaction, or to the major part of the Directors preſent at this ſale, ſhall forthwith make a further depoſit." Now there is no pretence to ſay that with reſpect to tea the *Eaſt India* Company have a right to require any further depoſit than that which the act requires; and therefore it appears to me it might fairly be contended, that a purchaſer at that ſale might ſay, I conſider theſe regulations as having nothing to do with tea; and therefore the Company could not when they ſpeak of "buyers" in the latter part of their regulations

lations mean the buyers of tea, but only the buyers of other goods. Taking it for granted however that these regulations did relate to tea (except with respect to the deposit, which it is clear must rest upon the act), it is remarkable that the Legislature did not choose to trust the *East India* Company with the sole power upon that point, for they have given the action as to the forfeiture of six times the value to any informer; and they have gone on to declare that which the *East India* Company thought they had a right to add as a penalty to their own regulations respecting other goods, that the person making default shall be excluded for ever from bidding at the Company's sales. I will not enter into the question whether the exclusion from any future sale be or be not a reasonable regulation? We are all clearly of opinion; that in matters where the Company is not restrained by Parliament they have a right to make reasonable regulations; but it will always be a question whether their regulations are reasonable or not. Undoubtedly the Company is not at liberty to direct that any individual shall be forever excluded, merely if they think fit so to direct; they may annex such conditions to their sales as are consistent with the obligation they are under to make them public sales, indifferent and open to all bidders; whatever regulations therefore they make, must be regulations not depending upon their sole will and pleasure, nor to be enforced or relaxed by that rule only; for if such regulations be allowed, they will thereby be enabled to make that which is required to be a public sale something totally different from a public sale. But we shall decide this case on a much narrower ground; for supposing all the regulations subsequent to the rule of deposit to apply as well to tea as to other commodities, and that the purchaser of tea is liable to all the penalties that the *East India* Company have thought fit to annex, we are still of opinion, that upon these words it is impossible for us to understand the term "satisfaction" in any other sense than a pecuniary satisfaction. It is true that the defaulter is to give satisfaction to the Court of Directors. But the word "satisfaction" as we understand it in a court of law must mean compensation for default occasioned by the breach of a condition. It is impossible for us, unless it were so clearly expressed as that there could be no doubt, to suppose that the word "satisfaction" means until the defaulter shall obtain the good

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will and pleaſure of the Court of Directors. It was ſaid at the bar that the meaning was, until the defaulter ſhould give them ſatisfaction with reſpect to the reaſons why he did not perform the conditions. If that was meant, it had better have been as I ſtated before, till he ſhall do it with our leave and licence, leaving it open to themſelves arbitrarily to grant or refuſe that leave and licence. If it had meant pecuniary ſatisfaction, it may be argued it would not have been to the Court of Directors, but to the *Eaſt India* Company. And indeed I have no doubt that they did not underſtand the term "ſatisfaction" according to the conſtruction which we in a court of law ſhall put upon it. But we are to conſider whether the buyer had not a right to underſtand it ſo if he thought fit, and whether we ſhall exclude him for ever from a public ſale, becauſe he has become a public bidder under conditions, the legality of which may be doubted, and the words of which import, that unleſs he ſhould do certain things, he ſhould be excluded until he ſhould have made ſatisfaction? Whether he had not a right to ſay (and I think he had) "I underſtood that I was not to bid again till I had made ſatisfaction for my default by making good all the payments with intereſt; thoſe payments the Company have accepted, not in ſuch a manner I admit as to evade the forfeiture, but in ſuch manner as to make that ſatisfaction, the not making of which would ſubject me to this heavy penalty of being for ever excluded from that ſale, which all the ſubjects of the country are entitled to bid at; if I had not done this the Company might have brought an action againſt me for the breach, and recovered ſuch damages as a jury would give?". Upon this ground therefore, independent of other conſiderations, we are of opinion, that the *Eaſt India* Company had no right to exclude this man from bidding till he had given what they might think a ſatisfaction; but only till he ſhould make ſufficient reparation for the injury they had ſuſtained by the breach of his agreement with them to pay certain ſums of money on certain given days. If they had thought fit to impoſe this penalty they ſhould have brought an action againſt him for not fulfilling his contract; and if he did not pay thoſe damages which a jury might give, I ſhould think they would have authority to exclude him, becauſe that would not be a partial regulation, but would affect all mankind alike, and every man who did not comply would be excluded. Therefore we are of

opinion, that under the circumſtances of this caſe this action well lies, and that the Plaintiff is entitled to recover. I heartly recommend to the *Eaſt India* Company, as well worth their conſideration, to reflect whether it would not be better that they ſhould obtain the ſanction of the Legiſlature as to the regulation of their ſales, not only with reſpect to tea, but with reſpect to all other commodities.

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Judgment for the Plaintiff.

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INDEBITATUS aſſumpſit for ſervice performed by the Plaintiff as a ſailor on board the *Holderneſs*, of which the Defendant was maſter. The cauſe was tried before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after laſt *Michaelmas* Term, when a verdict was found for the Plaintiff under his Lordſhip's direction, with liberty to the Defendant to apply to the Court to have that verdict ſet aſide and a nonſuit entered. The circumſtances of the caſe were as follow. The Plaintiff, who was a negro, in *November* 1797 entered at *London* on board the *Holderneſs* bound for *Grenada* as an ordinary ſeaman out and home: on the arrival of the *Holderneſs* at *Grenada* the Plaintiff was claimed as a runaway ſlave by Mr. *Hardman* his former maſter, and delivered to him; and thereupon the Plaintiff, the Defendant, and Mr. *Hardman*, met and agreed, that on payment of 30 joes by the Defendant to Mr. *Hardman* the latter ſhould manumit the Plaintiff, which was accordingly done by a regular inſtrument of manumiſſion; and the Plaintiff on the ſame day entered into an indenture, in which deſcribing himſelf as "a free black man of the iſland of *Grenada*," he covenanted with the Defendant, his executors, adminiſtrators, and aſſigns, "to repair and go on board ſuch ſhip or veſſel as the Defendant ſhould appoint to parts beyond the ſeas, and continue on board ſuch ſhip or veſſel at ſuch place or places as the Defendant might have occaſion for his ſervices, and during the term of three years faithfully ſerve in the capacity of a ſailor or ſuch other ſervice as he ſhould be capable to do and perform as a covenant ſervant, according to the order and direction of the Defendant

Plaintiff agreed to ſerve as a ſeaman during a voyage to and from the *Weſt Indies*: on his arrival there he was claimed as a runaway ſlave, and delivered up to his maſter; whereupon it was agreed between the Plaintiff, his maſter, and the captain, that upon payment of a ſum of money by the captain to the maſter the latter ſhould manumit the Plaintiff, he covenanting to ſerve the captain as a ſeaman for three years at certain ſtipulated wages. The Plaintiff was accordingly manumitted, and having ſerved the captain upon the home-

ward voyage, commenced an action againſt him to recover wages for that voyage upon a *quantum meruit*. Held that he was eſtopped by his covenant from claiming more than the ſum ſtipulated

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and his aſſigns, without departing from or leaving the ſaid ſervice; and the Defendant for himſelf, his executors and adminiſtrators, covenanted to pay to the Plaintiff for the firſt year 15 *l.*, for the ſecond 20 *l.*, and for the third 25 *l.*, by quarterly payments." In conſequence of this the Plaintiff returned on board the *Holderneſs*, and ſerved as a ſailor on the voyage home, and for his wages in that voyage the preſent action was commenced; the wages for the outward bound voyage having been paid, as well as the money ſtipulated for by the indenture.

A rule *Niſi* for entering a nonſuit having been obtained on a former day,

Shepherd Serjt. now ſhewed cauſe, and inſiſted that the act of manumiſſion and the indenture muſt be conſidered as parts of one tranſaction, the manumiſſion being the conſideration of the Plaintiff's entering into the indenture; that the Defendant therefore had taken an undue advantage of the Plaintiff's ſituation, ſince the latter muſt be preſumed to have been willing to enter into any contract for the ſake of obtaining his freedom; that he might have been induced to bind himſelf to the Defendant for life, and thus only have exchanged one ſort of ſlavery for another, and that the Court therefore muſt hold an indenture into which the Plaintiff had been driven by ſuch circumſtances to be void as obtained from him under a ſpecies of dureſs; and conſequently that the Plaintiff was entitled like any other ſailor to ſeek a compenſation for his ſervices on board the Defendant's ſhip as if no indenture exiſted.

Bayley and *Beſt* Serjts. were proceeding to argue in ſupport of the rule,

But Lord ALVANLEY Ch. J. ſtopped them, ſaying—My brothers being all clearly of opinion that the Plaintiff cannot recover, it is not neceſſary to hear any further argument. For my own part however I entertain great doubts of the propriety of allowing the defence which has been ſet up to prevail; becauſe I dread the conſequences of giving effect to ſuch a contract as that which was entered into between the Plaintiff and Defendant in the Iſland of *Grenada*. I truſt however that this defence is only to be ſupported upon the fairneſs of the contract, apparent upon the face of the tranſaction; and that the contract would not be conſidered as valid in *England* if the ſtipulation had been that the Plaintiff ſhould ſerve the Defendant for life. The Plaintiff in the

preſent

preſent caſe being as free as any one of us while in *England* engaged to ſerve the Defendant as a ſeaman, and the Defendant undertook to pay him a ſtipulated ſum: at this time however the Plaintiff concealed that he was a runaway ſlave. Now I admit that the Defendant was entitled to a full compenſation for the breach of the Plaintiff's original contract, he having concealed the circumſtance of his being a ſlave, which circumſtance rendered him incapable of fulfilling his engagement. The Defendant is therefore entitled to be repaid the ſum of money which he advanced for the manumiſſion of the Plaintiff, in order to enable him to perform the ſtipulated ſervice on board his ſhip. But in this caſe it ſeems to me that the Plaintiff has taken a further advantage; for we muſt underſtand upon this tranſaction that the old articles for the voyage have been quaſhed, and that the Plaintiff has been compelled to enter into a new contract, by which he has bound himſelf, in conſideration of being redeemed from ſlavery and the penal conſequences attending his ſituation, to ſerve the Defendant for the term of three years. When the Plaintiff was claimed in *Grenada* as a runaway ſlave, he was not only liable to be remanded to ſlavery, but by the laws of the iſland he was ameſnable to ſevere puniſhment for his deſertion. Now if ſuch a contract as this is to be ſuſtained, I tremble at the conſequences; for if this be allowed the maſters of ſhips may conſider themſelves at liberty to purchaſe the freedom of as many negroes in the *Weſt Indies* as they may think proper, and take engagements from them to ſerve for life. No doubt the negroes would willingly engage in ſuch contracts. The conſequence would be, that a vaſt number of negroes might be brought over into this country, not indeed ſtrictly as ſlaves, but as covenant ſervants, bound to ſerve for life; this would be little leſs than an exchange of one ſpecies of ſlavery for another: and though by the law of *England* ſlavery be prohibited in this country, yet this ſort of contract might afford the means of introducing indirectly, what cannot be directly enforced. It appears to me that the only uſe which the Defendant is entitled to make of the tranſaction in *Grenada* is to deduct from the wages due to the Plaintiff upon the old contract juſt ſo much as he has been obliged to pay to enable the Plaintiff to fulfil that contract.

HEATH J. I confeſs that this matter ſtrikes me in a very different point of view. When this Plaintiff was claimed in *Grenada*

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he was incapable of performing the ſervice for which he now brings his action. He was alſo liable to ſevere puniſhment for having run away from his maſter: and he was a ſlave for life. In that ſituation the contract in queſtion was entered into, to which the parties were the Plaintiff, the Defendant, and the Plaintiff's old maſter. I conſider the whole as one tranſaction. The Defendant was to advance the money for the Plaintiff's freedom, in conſideration of which the maſter was to manumit the Plaintiff, and the Plaintiff thus manumitted was to enter into a new contract to ſerve the Defendant for three years, for which he was to receive certain wages from the Defendant. This was an agreement for the advantage of the Plaintiff: he was to be relieved from puniſhment; he was to become a free man; and he was to receive a compenſation for his ſervice. This agreement he voluntarily entered into. In all countries where ſlavery is tolerated, agreements between the maſter and the ſlave reſpecting the manumiſſion of the latter are enforced by the law. Suppoſe the ſlave after having obtained his manumiſſion ſhould refuſe to perform his part of the contract, there is no country where ſuch conduct would be endured. He is competent to enter into a contract for the purpoſe of his manumiſſion, and therefore ſuch contract may be put in force againſt him. If indeed any fraud or colluſion between the Defendant and the old maſter had appeared whereby any equity could ariſe in the Plaintiff's favour, the caſe might have had a very different complexion: but this caſe ſtands clear of all fraud or colluſion; and conſidering the contract as having been beneficial to the Plaintiff, I think that he ought to be bound by his own agreement.

ROOKE J. I agree in opinion with my brother *Heath*. In order to aſcertain with whom the juſtice of this caſe lies, let us conſider who committed the firſt fault. When the ſhip was about to ſail from *London* the Plaintiff entered into articles which his ſituation rendered him incapable of performing. And though he might enter into a contract to go to any other place but to *Grenada*, yet he could not engage to go there without danger of being detained. Here then was an agreement entered into without a fair diſcloſure of circumſtances relative to the contract. The conſequence was, that on his arrival at *Grenada* a circumſtance not diſcloſed at firſt was diſcovered, which prevented the Plaintiff from fulfilling his engagements. Being taken as a runaway

ſlave, he became liable to puniſhment, and the forfeiture to his maſter in *Grenada* of all the wages which he had earned during the outward voyage. Unleſs therefore the jury had been of opinion that fraud or dureſs had been employed, I cannot but think the contract entered into in *Grenada* advantageous to the Plaintiff. If indeed the man had been free he might perhaps have made a more advantageous bargain for himſelf. But being a ſlave he could not enter into any contract without the leave of his maſter; and ſo being a ſlave, and liable to the terrible conſequences of deſertion, it is agreed that he ſhall be ſet free, he receives his wages for the outward bound voyage, and on the other hand he engages to ſerve the Defendant for three years at certain wages on board ſuch ſhip, and at ſuch places as the Defendant ſhall have occaſion for his ſervices. Would any jury have pronounced ſuch a contract to be diſadvantageous to the Plaintiff? With reſpect to the enormous extent to which it has been ſuppoſed that contracts of this ſort may be carried, it is ſufficient for us in the preſent inſtance to decide upon the caſe before the Court: and I do not bind myſelf to enforce any other contract unreaſonable in its nature, when it may appear that dureſs has been employed, or undue advantage taken of the ſituation of the parties. In this caſe it appears to me, that the original contract between the Plaintiff and Defendant was put an end to by the agreement entered into at *Grenada*, and that the Plaintiff therefore ought to have been nonſuited.

CHAMBRE J. The queſtion now brought before the Court muſt be decided according to the rights of the litigating parties, without reference to any imaginary conſequences of imaginary caſes. Certainly the Plaintiff is entitled to avail himſelf of any circumſtances of dureſs of which he could take advantage in ordinary caſes: and if he could prove that the agreement was obtained from him by actual force, the agreement would be void. Here indeed at the time of entering into the contract he was in the ſituation of a ſlave. But I do not know that a ſlave is precluded from entering into a contract. He may do ſo provided his contract do not affect the rights of his maſter. Though he cannot deprive his maſter of his ſervices, yet with the conſent of his maſter he may engage to do ſervice for another. No evidence of actual dureſs has been given, but we are deſired to infer it

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from the circumſtances of the caſe. It is ſuppoſed that he has been driven to an unreaſonable and unconſcientious bargain: but I cannot ſay that it ſo appears to me. What was his condition at *Grenada*? Being claimed as a runaway ſlave he was conſidered as a criminal, he was liable to very ſevere puniſhment, he was incapable of recovering for his own benefit the money which he had earned upon the outward bound voyage, and he was unable to fulfil his contract with the Defendant. Then what is there unreaſonable in the terms of this agreement? It is true that by the articles he had contracted with the Defendant for a greater rate of wages; but from that contract he could derive no benefit, for his maſter was entitled to all the wages he might earn. Independent of this circumſtance however, the former agreement was entered into in time of war, whereas the latter was for three years certain, during which time it was probable that the war would ceaſe and the rate of wages be reduced. By reſcinding ſuch a contract as this I think we ſhould be guilty of great inhumanity; for unleſs ſuch a contract can be enforced, no maſter of a ſlave would agree to his manumiſſion, nor any perſon be willing to pay the price of his freedom; the conſequence of which would be that the preſent Plaintiff and all others in ſimilar ſituations muſt remain in perpetual ſlavery. In this caſe an actual manumiſſion took place, the maſter was a party to the agreement, and nothing occurred in the tranſaction to impeach the validity of the contract. This is the deciſion which I think the Court bound by the rules of law to make, and which is moſt conſiſtent with the dictates of humanity.

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Rule abſolute.

(IN THE EXCHEQUER CHAMBER.)

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ASSUMPSIT on a policy of insurance.

The first count of the declaration (upon which the verdict was taken) stated, that whereas our Sovereign Lord the King by virtue of the powers vested in him by a certain act of Parliament made at a session of Parliament holden at *Westminster* in the thirty-fifth year of his reign, entitled, "An act to make further provision respecting ships and effects coming to this kingdom to take the benefit of his Majesty's orders in council of the 16th and 21st days of *January* 1795, and to provide for the disposal of other ships and effects detained in or brought into the ports of this kingdom" on the 13th day of *June* 1795, to wit, at *London*, &c. did by and with the advice of his Privy Council issue his Royal Commission under the Great Seal of *Great Britain* to *James Craufurd*, *J. B. A. C. J. B.* and *A. B.* directed, whereby our said Lord the King did nominate, constitute, and appoint them Commissioners for the purposes mentioned in the said act, and did authorise and require them to take all such ships and cargoes, goods, wares, merchandizes, and effects, into their possession and under their care as his Majesty could or might by virtue of the said act authorise them to take into their possession and under their care, and to manage, sell, and dispose of the same to the best advantage, according to such instructions as they the said *J. C.* &c. should from time to time receive from his said Majesty, his heirs and successors, with the advice of his and their Privy Council, and otherwise in all respects according to the said act; and also to give such directions respecting the proceeds of the sale or sales of any cargoes or parts of cargoes mentioned in the said act to have been ordered to be sold, as the Commissioners to be appointed by virtue of the said act were therein and thereby required and authorised to give respecting the same, thereby also giving and granting to them the said *J. C.* &c. all and singular such powers and authorities, and authorising and empowering them to do, execute, and perform, all and singular such duties and matters and things as his said Majesty could or might give or grant, authorise

The Commissioners appointed by the King under the 35 *Geo.* 3. *c.* 80. for the care, sale, and management of such ships and cargoes belonging to subjects of the United States as should be brought into the ports of this kingdom, were held to have an insurable interest in *Dutch* ships on their passage to this country, having been taken by the captain of a *British* man-of-war under instructions from the Admiralty to take all ships and cargoes belonging to the subjects of the United States, and to bring them into the ports of this kingdom to be detained provisionally.

Held also that they might recover for a loss upon such ships by perils of the sea, though the loss did not happen until after a proclamation had issued for general reprisals against the *Dutch*.

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or require to be done, executed, or performed, by the Commiſſioners to be appointed by his ſaid Majeſty in purſuance and by virtue of the ſaid act. And whereas before the making of the ſeveral writings or policies of inſurance hereafter mentioned, to wit, on the 10th day of *June* 1795, certain ſhips called the *Houghley*, *Alblaſſendam*, *Dordrecht*, *Zeelelie*, *Meermin*, *Agatha*, *Mentor*, and *Surchcance*, with cargoes of goods and merchandiſes on board the ſame reſpectively, being ſhips, goods, and merchandizes, belonging to ſubjects and inhabitants of the United Provinces coming from certain parts of *Aſia* and *Africa*, and bound to certain parts of the United Provinces, were by his ſaid Majeſty's orders ſeized and taken at ſea in their ſaid voyage from *Aſia* and *Africa* to the ſaid United Provinces by the Commander of one of his ſaid Majeſty's ſhips of war in company with ſome ſhips in the ſervice of the United Company of Merchants of *England* trading to the *Eaſt Indies*, in order and to the intent that ſuch ſhips, goods, and merchandizes, might be brought into the ports of this kingdom; and ſuch ſhips with ſuch goods and merchandizes on board the ſame reſpectively had been carried into *St. Helena* for the purpoſe of being brought from thence to ſome port or ports in this kingdom, to wit, at &c.; and the ſaid ſhips, goods, and merchandizes, ſo having been carried into *St. Helena* aforeſaid, and the ſaid *J. C.* &c. ſo being ſuch Commiſſioners ſo appointed and authoriſed as aforeſaid, the ſaid *J. C.* &c. afterwards, to wit, on the 22d of *Auguſt* 1795, to wit, at &c. according to the uſage and cuſtom of merchants, cauſed to be made and effected a certain writing or policy of aſſurance, purporting thereby and containing therein that the ſaid *J. C.* &c. by the name, firm, and deſcription of the Honourable the Commiſſioners for ſale of *Dutch* property, the ſame then and there being their uſual ſtyle and firm of dealing, as well in their own name, &c. did make aſſurance, &c. The declaration proceeded to ſet out a policy in the uſual form on the above mentioned ſhips, and to ſtate the undertaking of the Plaintiff in error to become an inſurer, and his ſubſcription to the policy. It then averred, that notice of the loſſes and misfortunes which befel the ſaid ſhips and goods, as hereafter mentioned, arrived in this kingdom before any declaration and valuation was or could be made of the ſaid ſhips and goods, to wit, at &c. That the ſhips were in good ſafety at the time mentioned in the policy. It alſo alleged, that the ſaid ſhips and

and goods were ſhips and goods, which, if they had arrived at *London* aforeſaid from the ſaid voyage, the ſaid *J. C. &c.* as ſuch Commiſſioners as aforeſaid, were and would upon ſuch arrival have been authoriſed to take into their poſſeſſion and under their care, and to manage, ſell, and diſpoſe of the ſame according to the form and effect of the ſaid commiſſion and act of Parliament, and which were intended to be brought from *St. Helena* aforeſaid to *London* aforeſaid for thoſe purpoſes in the ſaid writing or policy of aſſurance mentioned, to wit, at, *&c.*; and that the ſaid *J. C. &c.* as ſuch Commiſſioners as aforeſaid under and by virtue of the ſaid act of Parliament, and the ſaid commiſſion at the time of the ſailing of the ſaid ſhips from *St. Helena* as hereinafter mentioned, and from thence, until, and at the times of the ſeveral loſſes hereinafter mentioned, were intereſted in the ſaid ſhips and goods to a large amount, to wit, to the amount of all the money by them ever inſured thereon; and that the ſaid inſurance ſo made as aforeſaid was ſo made to and for their uſe, benefit, and account, as ſuch Commiſſioners as aforeſaid. The declaration further ſtated, that the ſhips ſet ſail from *St. Helena* for *England* before the 22d of *Auguſt* 1795, *viz.* on the 2d of *July* 1795; and before their arrival, *viz.* on the 1ſt *September* 1795, four of them were loſt by perils of the ſea, whereby the aſſured ſuſtained an average or partial loſs to a large amount, to wit, to the amount of 40 *l.* upon every 100 *l.* inſured.

To this declaration the Defendants below pleaded the general iſſue. The cauſe came on to be tried before Lord *Kenyon* Ch. J. and a ſpecial Jury at the *Guildhall* Sittings after *Michaelmas* Term 1799. His Lordſhip having directed the Jury to find a verdict for the Plaintiffs below upon the firſt count of the declaration, a bill of exceptions was tendered, from which, when annexed to the record in this Court, the caſe appeared to be as follows:

The Plaintiffs below gave in evidence a commiſſion under the Great Seal, dated the 19th of *June* 1795, which (after referring to the proviſions of the 35 *Geo.* 3. *c.* 80. reſpecting ſhips and effects belonging to ſubjects of the United Provinces detained in or brought in, or to be detained or brought into the ports of this kingdom; and after reciting that ſeveral ſuch ſhips had been or might be thereafter detained in or brought into the ports of this kingdom), appointed the Plaintiffs to take all ſuch ſhips, cargoes, *&c.* into their poſſeſſion and under their care, as the Crown was

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empowered to ſeize under the ſaid act, and to manage, ſell, and diſpoſe of the ſame to the beſt advantage, according to ſuch inſtructions as they ſhould from time to time receive from his Majeſty, with the advice of his Privy Council, and to diſpoſe of the proceeds, and to do every thing which the Crown could authoriſe them to do by virtue of the ſaid act. They then gave in evidence certain inſtructions under the ſign manual to the commanders of his Majeſty's ſhips of war and ſhips carrying letters of marque, dated the 9th of *February* 1795, directing them to bring into the ports of this kingdom all *Dutch* veſſels bound to or from any ports in *Holland*, in order that they, together with their cargoes, being *Dutch* property, might be detained proviſionally; and that ſpeedy reſtitution ſhould be made of all cargoes belonging to the ſubjects of allied or neutral powers. They then proved that the ſhips mentioned in the policy, before the time when the policy was effected, *viz.* on the 10th of *June* 1795, were *Dutch* ſhips, and that they with their cargoes, alſo *Dutch*, were coming from certain parts in *Aſia* and *Africa* to certain ports of the United Provinces, and were by virtue of the above inſtructions ſeized by Captain *Eſſington* the commander of the *Sceptre* man of war, in company with ſome ſhips in the employment of the *Eaſt India* Company, and carried into *St. Helena* for the purpoſe of being brought into this kingdom. They alſo proved the Defendant's ſubſcription to the policy; that he had notice of the loſs before any valuation could be made; that the policy was effected on account of the Plaintiffs as ſuch Commiſſioners as aforeſaid; that the ſhips ſailed from *St. Helena* on the 2d of *July* 1795, and that they were loſt in the manner ſtated in the declaration, in conſequence of which the aſſured ſuſtained an average loſs. The Defendant on his part gave in evidence an order of Council, dated the 13th of *June* 1795, which after reciting, that by the powers veſted in the Crown by the beforementioned act his Majeſty had iſſued his commiſſion to the Plaintiffs authoriſing them to take the ſhips and cargoes of *Dutch* ſubjects, which had been or might thereafter be brought into the ports of this kingdom, into their poſſeſſion and under their care, and to manage and diſpoſe of them to the beſt advantage, according to ſuch inſtructions as they ſhould from time to time receive from his Majeſty, with the advice of his Privy Council, directed them forthwith to take into their poſſeſſion and care all ſuch

ſhips,

ſhips, &c. according to the liſts thereof which they ſhould from time to time receive from the Commiſſioners of the Cuſtoms in *England* and *Scotland*, in purſuance of directions tranſmitted to them by the Lords of the Treaſury; together with other directions not material to this caſe. He then gave in evidence the King's Proclamation for general reprizals againſt the ſhips, goods, and ſubjects, of the United Provinces, dated the 15th of *September* 1795. He next produced an order of Council, dated the 26th of *November* 1795, which after ſtating that the four *Dutch Eaſt India* ſhips, *viz.* the *Blaſſendam*, the *Agatha*, the *Mentor*, and the *Dordrecht*, then lying in the river *Shannon* in the kingdom of *Ireland*, were ſent in there by his Majeſty's ſhip *Sceptre*, antecedent to the order for granting general reprizals againſt the ſhips of the United Provinces, and that agents had been appointed by *William Effington*, Eſq. the commander of the *Sceptre*, and others, concerned in ſending in the ſaid veſſels, and that the ſole intereſt in all ſhips ſo ſent in was inveſted in his Majeſty, and the appointment of agents for the care and diſpoſal thereof did of right belong to him, appointed the Plaintiffs to be the agents on behalf of his Majeſty for the care and management of the ſaid four *Dutch* ſhips and their cargoes. The Defendant alſo proved that the Plaintiffs took poſſeſſion of the above four ſhips in the kingdom of *Ireland*. He then gave in evidence certain proceedings in the High Court of Admiralty againſt each of thoſe ſhips, and ſentences of condemnation, pronouncing each of "the ſaid ſhips and cargoes to have been taken before the declaration of hoſtilities againſt the *Dutch*, and to have then belonged to ſubjects of the States General of the United Provinces, now the enemies of the Crown of *Great Britain*, and as ſuch or otherwiſe ſubject and liable to confiſcation." Laſtly, he gave in evidence certain inſtructions from his Majeſty to the ſaid High Court of Admiralty, dated the 10th of *October* 1795, which after reciting the before-mentioned act, enabling the King to grant a Commiſſion to three or more perſons to take into their poſſeſſion and manage, &c. all ſuch *Dutch* ſhips which might be thereafter detained in or brought into the ports of this kingdom, and reciting that ſuch a commiſſion had iſſued, and that ſince the iſſuing of the Commiſſion his Majeſty had thought fit to order general reprizals againſt the ſhips, &c. of the United Provinces, and to iſſue a Commiſſion authoriſing the Lords of the Admiralty to take cognizance of all captures, &c. directed the ſaid High

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Court of Admiralty to proceed to the adjudication of ſuch ſhips, &c. of which poſſeſſion had been taken or ſhould be taken by the ſaid Commiſſioners, as ſhould be proceeded againſt by the King's Advocate General, in order that the ſame might be condemned to the Crown as good and lawful prize, reſerving nevertheleſs to the ſaid Commiſſioners the ſale, care, and management thereof, as well before as after final adjudication according to the proviſions of the ſaid act."

Upon this evidence the counſel for the Defendant inſiſted that the Plaintiffs could not maintain their iſſue, becauſe the ſaid ſhips mentioned in the policy of inſurance in the firſt count of the declaration were not ſhips, which, if they had arrived at *London* from the ſaid voyage therein mentioned, the ſaid Plaintiffs, as ſuch Commiſſioners, would have been authoriſed to take into their poſſeſſion, and under their care, according to the effect of their Commiſſion, and the act of Parliament mentioned in the firſt count of the declaration, and becauſe upon the evidence produced it appeared that the Plaintiffs as ſuch Commiſſioners under the ſaid act and Commiſſion were not at the time of the ſailing of the ſaid ſhips from *St. Helena*, as in the firſt count of the declaration mentioned, and from thence, until, and at the time of the ſeveral loſſes therein alſo mentioned, intereſted in the ſaid ſhips or goods, or either of them, to any amount or in any manner whatſoever, ſo that a legal and valid aſſurance could be effected by the Plaintiffs as ſuch Commiſſioners on their own account; and that the inſurance ſo made, as in the firſt count of the declaration mentioned, was not made to and for the benefit and on the account of the Plaintiffs as ſuch Commiſſioners according to their allegation. Lord *Kenyon* however directed the Jury that in point of law the Plaintiffs had maintained their iſſue, and the jury accordingly found a verdict for the Plaintiffs on the firſt count of the declaration.

The aſſignment of errors was conformable to the objections taken at the trial.

This caſe was argued three times, firſt in *Michaelmas* Term 1800 by *Giles* for the Plaintiffs in error, and *Wood* for the Defendants in error; ſecondly in *Hilary* Term 1801 by *Law* for the former, and *Gibbs* for the latter: after theſe two arguments Lord *Eldon*, before whom as Chief Juſtice of the Common Pleas the caſe was debated, having been made Lord Chancellor, and Lord

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Alvanley having ſucceeded him as Chief Juſtice of the Common Pleas, a further argument was deſired by the Court; and accordingly in *Michaelmas* Term 1801 the caſe was argued by *Erſkine* for the Plaintiffs in error, and *Park* for the Defendants in error.

Arguments for the Plaintiffs in error.—The firſt count of the declaration upon which the verdict has been taken contains two material averments, the firſt, that the ſhips and goods inſured were ſhips and goods, which, if they had arrived at *London*, the Commiſſioners would have been authoriſed to take into their poſſeſſion, and to manage, ſell, or otherwiſe diſpoſe of, according to the form and effect of their Commiſſion, and of the act of Parliament; the ſecond, that the Commiſſioners under and by virtue of their Commiſſion, and of the act of Parliament at the time of the ſailing and loſs were intereſted in the ſhips and goods inſured. Both theſe averments are negatived by the evidence. Under the act which authoriſed the King to grant a Commiſſion, and under the Commiſſion connected with the inſtructions, the Commiſſioners had only authority to take into their poſſeſſion ſuch ſhips and goods as had belonged to the ſubjects of the United Provinces, and were brought into the ports of this kingdom to be detained proviſionally. By orders of Council of the 16th and 21ſt of *January* 1795, confirmed by the 35 *Geo.* 3. *c.* 15. the King authoriſed the ſubjects of the United Provinces to land their goods in the ports of this kingdom in veſſels of any country, and navigated in any manner without being liable to ſeizure, and directed that they ſhould be warehouſed under certain regulations. On the 9th of *February* he was pleaſed to direct the commanders of his ſhips of war and privateers to bring in by force all *Dutch* veſſels bound to the ports of *Holland*, in order that they and their cargoes, being *Dutch* property, might be detained proviſionally. On the 22d of *May* following the 35 *Geo.* 3. *c.* 80. paſſed, which after reciting the 35 *Geo.* 3. *c.* 15. authoriſed the proprietors of ſhips and goods who had voluntarily taken the benefit of that act to diſpoſe of thoſe ſhips and goods under certain regulations contained in the firſt twenty ſections. The twenty-firſt ſection then after reciting that other ſhips and cargoes had been or might be thereafter detained or brought into the ports of this kingdom, and that ſuch ſhips and goods might periſh unleſs ſome proviſion were made for them, authoriſed his Majeſty to grant a commiſſion, enabling three

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or more perſons to take ſuch ſhips and cargoes into their poſſeſſion, &c. Now the ſhips and goods to which this recital refers were to be brought in under the order of the 9th *February* for the purpoſe of being detained proviſionally, and the Commiſſioners had no authority to take poſſeſſion of any but ſuch ſhips and cargoes. The ſhips inſured were indeed taken on the 10th of *June* under the inſtructions of the 9th of *February* preceding, and carried into *St. Helena*, from which they ſailed on the 2d of *July* 1795; but on the 15th of *September* 1795 a proclamation iſſued for making repriſals upon the property of the ſubjects of the United Provinces. Before the date of this proclamation therefore the goods were veſted in the ſubjects of the United Provinces, who had an inſurable intereſt in them, and after that date they became prize, and veſted in the King *jure coronæ*, who acquired by the proclamation an inchoate right under the law of nations, ſubject only to the adjudication of the Court of Admiralty; and Captain *Eſſington* no longer held the ſhips for the purpoſe of being brought into the ports of this kingdom to be detained proviſionally, but as the property of the Crown. With reſpect to the ſhips which actually did arrive, and of which the Commiſſioners took poſſeſſion, they did not take poſſeſſion of them by virtue of the act of Parliament, but under an authority from the Crown of the 26th of *November* 1795, appointing them prize agents. The Court of *King's Bench* has afforded an expreſs authority upon this point. For in a late caſe where Lord *Keith* had taken certain ſhips belonging to the ſubjects of the United Provinces at the Cape of *Good Hope* before the Proclamation for repriſals, and having brought them into this country after that Proclamation proceeded againſt them in the Court of Admiralty as prize, the Commiſſioners applied for a prohibition, urging that they were entitled to the ſole management and diſpoſal of the ſhips, but the prohibition was refuſed. The Commiſſioners indeed by their own act have ſhewn, that they did not conſider the ſhips which arrived as coming under their control as Commiſſioners appointed by the act: for they took poſſeſſion of them in *Ireland*, which they could not have done under their Commiſſion, but only under their authority as prize agents. The ſecond averment is that the Commiſſioners under and by virtue of their Commiſſion and the act of Parliament at the time of the ſailing and loſs were intereſted in the ſhips and goods. It appears however upon the evidence that they had no

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insurable interest in them. They had merely a contingent expectation of managing and controlling them in case they should be brought into the ports of this kingdom, an event which at the time when the policy was effected had not happened, might not happen, and in fact ultimately never did happen. Now what is the nature of a policy of insurance? It is an instrument by which a party "causes himself to be insured" that is indemnified against any injury happening to certain subjects stated in the policy: but in order to be indemnified the assured must have the thing which he insures against peril. To constitute an insurable interest therefore there must be a present right of property in the subject matter, capable of being transferred by the ordinary means of transfer, and capable of being vindicated in point of right by the ordinary remedies of the law. The uniform course of the precedents upon policies of insurance has been to aver an interest in so many words, or to state those circumstances from whence a conclusion of interest must necessarily arise. The oldest entry of the kind is in precedents in the Upper Bench, page 77. where the declaration contains several allegations introduced for the sole purpose of shewing the plaintiff's property in the goods. In *Goram* v. *Sweeting*, 2 *Saund.* 200. 205. though the insurance was from *London* to *Gibraltar*, "without further account to be rendered for the same," yet the declaration alleges an abandonment, which shews that it was thought necessary that the insurer should have an interest capable of abandonment; and in the case *Gallop* v. *Proudfoot*, *Vidian* 48. the plaintiff expressly averred, that at the time of the insurance he was possessed of a part of the ship; though he declared upon a valued policy "without further account." Indeed in the case of *Martin* v. *Sitwell*, 1 *Show.* 156. which was previous to the statute 19 *Geo.* 2. respecting wager policies, the plaintiff who had made an insurance was allowed to recover back the premium, because no goods had been put on board; which he could not have been allowed to do if the policy would have been equally good whether the plaintiff had any interest on board or not. That a mere wager is legal there can be no doubt, but insurance is a different thing from a wager. It is a contract respecting the indemnity of property against certain accidents which may befall it to the detriment of the persons interested in it. And it was so considered by Lord Chief Justice *Willes* in the case of *Pole* v. *Fitzgerald*, *Willes' Rep.* 645. who cites the authority of *Roccus* and

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Cleirac to that effect. Conſiſtently therefore with this notion it is that all the precedents, printed and manuſcript, previous to the ſtatute 19 *Geo.* 2. with one ſingle exception either aver an intereſt, or contain a diſpenſation of the proof of intereſt. The ſingle exception is contained in *Clift's Entr.* 77. *Grotton* v. *Aldworth*; but that caſe does not appear to have come into diſcuſſion, and was probably a mere precedent inaccurately drawn. Indeed before the ſtatute the Courts were extremely jealous of policies intereſt or no intereſt, ſometimes compelling the parties to abandon what intereſt they actually had, and ſometimes upon bills filed for that purpoſe, ordering them to be delivered up to be cancelled; as in *Goddard* v. *Garret*, 2 *Vern.* 269. And in *Le Pypre* v. *Farr*, 2 *Vern.* 716. the aſſured was ordered to diſcover what goods he put on board, though he had offered to abandon, in order that it might be referred to the maſter to examine the value of the goods ſaved and deduct it out of the ſum inſured. The touchſtone therefore of inſurances, not made in the form of a wager, is that there be ſomething which may be abandoned; thus Lord *Mansfield* ſays that it is the criterion of wagering policies that you cannot abandon; and though in valued policies if there be ſomething to abandon, a larger intereſt than really exiſts may be inſured, yet ſuch policies have only been allowed for the accommodation of traders who might be ignorant what ſort of cargoes their factors might have to remit. Thus ſtood the law of inſurance up to the 19 *Geo.* 2. *c.* 37. the object of which was to prevent the contract of inſurance being made uſe of as the means of wagering and to place it from that time on the ſame footing on which it originally ſtood at common law. The ſtatute, after reciting that many pernicious practices had enſued from wager policies, ſtrictly prohibits any ſuch to be made "intereſt or no intereſt," or "without further proof of intereſt than the policy," which are ſpecifications of the terms uſually inſerted in ſuch policies: but the words which follow apply not only to the mode in which the evaſion might be attempted, but to the very thing itſelf, "or by way of gaming or wagering or without benefit of ſalvage to the inſurer." With the exception of *Le Cras* v. *Hughes*, *Park Inſur.* 269. *Gregory* v. *Chriſtie*, *Park Inſur.* 11. and *Flint* v. *Le Meſurier*, *Park Inſur.* 268. *in notis*, all the caſes ſubſequent to the 19 *Geo.* 2. are reconcileable with the principles of inſurance contended for by the Plaintiffs in error. In *Le Cras* v. *Hughes* Lord *Mansfield* relied upon the authority of a caſe of

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Grant v. *Parkinſon* (*a*) which had been previouſly determined, but which caſe if accurately examined will be found to bear no analogy to it. There the inſurance was "on 1,000*l.* being profits expected to ariſe from the cargo of the ſhip *Providence* in the event of her ſafe arrival at *Quebec*," and there was an allegation in the declaration that the Plaintiff "until and at the time of the misfortune hereinafter mentioned was intereſted in the profits expected to ariſe from the ſaid goods, wares, and merchandizes to a large value," &c. Now the fact was, as indeed might be inferred from this allegation, that the aſſured was the owner of the goods on board, and conſequently was intereſted in the profits to ariſe therefrom. Thoſe goods he had inſured by a ſeparate policy; and therefore by making a diſtinct policy on the profits he had only ſecured thoſe profits to himſelf by this ſecond policy which he might have ſecured by the firſt had it been a valued policy upon the goods and profits to ariſe therefrom. Lord *Mansfield* begins his judgment by obſerving, "This was a cargo of molaſſes belonging to the plaintiff." The ſubſtratum and foundation of the inſurance therefore was not a bare expectation of intereſt in a ſubject with which at the time of affecting the inſurance the inſured was not connected, but an expectation of profits on goods at that time his, and inſurable together with the profits in a valued policy. Independent of theſe obſervations however *Le Cras* v. *Hughes*, whether properly decided or not is very diſtinguiſhable from the preſent caſe. There Lord *Mansfield* conſidered the main queſtion to be, whether that poſſeſſion which the joint captors had obtained of the prize was, when conſidered with reference to the prize act and proclamation, ſuch a poſſeſſion as veſted in the captors an inſurable intereſt; the diſtinction between that caſe and the preſent therefore is very eſſential, in the former the inſurable intereſt being ſuppoſing to ariſe out of the actual poſſeſſion, whereas in the preſent caſe the inſurable intereſt is ſuppoſed to ariſe out of the expectation of poſſeſſion. With reſpect to the obſervation ſuppoſed to have been made by Lord *Mansfield* that an agent of prizes not having the poſſeſſion of the property may inſure, it ſeems to be inconſiſtent with the reſt of his judgment, which diſtinctly proceeds upon the ground of the aſſured having the poſſeſſion as well as the expectation of the property. It may be added that Lord *Mansfield*

(*a*) This caſe was cited from Mr. *Dunning*'s brief in the cauſe and a manuſcript note of the judgment.

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in a great meaſure relied upon an idea that the prize act and proclamation veſted the property of a joint capture in the joint captors, which appears to have been a miſtake; and accordingly it has been found neceſſary to introduce a clauſe in the late prize acts 33 *Geo.* 3. *c.* 66. *ſ.* 3. 37 *Geo.* 3. *c.* 109. *ſ.* 3. for the expreſs purpoſe of veſting in the captors the property of a joint capture by the army and navy. With reſpect to *Gregory* v. *Chriſtie* it is difficult to diſcover upon what ground the expenditure of money for the uſe of a ſhip in any way whatever, can be inſured as an intereſt in goods, ſpecie, and effects. In the caſe of *Flint* v. *Le Meſurier* Lord *Kenyon* is ſuppoſed to have expreſſed an opinion that the commiſſions of a conſignee might be inſured, but it appears that the matter was compromiſed, and the caſe did not come to any deciſion. It is therefore to be conſidered as nothing more than a note of an *obiter dictum* much too looſe to form the ground of any deciſion. The next claſs of caſes to be conſidered relates to inſurance upon freight. It may be contended that as all intereſt in freight is a mere expectation, no one being entitled to it until the arrival of the goods, it does not fall within the deſcription of intereſt which the plaintiffs in error contend to be neceſſary. It is obſervable however that this expectation is founded upon an abſolute contract entered into between the ſhip owner and the merchant; and is therefore an expectation which is not to be defeated by any other contingencies than thoſe very perils againſt which he inſures: for even this expectation built upon an abſolute contract will not raiſe an inſurable intereſt unleſs the goods be actually put on board. The two caſes of *Tonge* v. *Watts*, 2 *Str.* 1251. and *Montgomery* v. *Egginton*, 3 *Term Rep.* 362. clearly eſtabliſh this principle: in the former of theſe though the goods were lying upon the ſhore ready to be ſhipped, and the policy on freight had been previouſly effected, yet as the ſhip was deſtroyed before the goods were put on board, it was held that though the aſſured had certainly loſt his freight yet there was no inception of intereſt in the freight, but a mere expectation; and in the latter where part of the goods were actually put on board the inſured was allowed to recover. The ſame principle prevailed in *Thompſon* v. *Taylor*, 6 *Term Rep.* 478. for though no goods had actually been put on board yet as the ſhip had broken ground and ſet ſail for the place where they were to be taken in there was an inception of the contract for freight. The intereſt and the riſk muſt be coeval. The remote and viſionary intereſt which was the ſubject

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of the preſent inſurance may be compared to that which was brought forward in a caſe of *The Attorney General* v. *Smith* before Lord *Thurlow* Ch. J. by the next of kin of a lunatic in order to have a bill to perpetuate the teſtimony of witneſſes, and thereby ſecure his ſucceſſion to the lunatic's eſtate: which application was refuſed on the ground of want of intereſt. And Lord *Thurlow* ſaid, "The preſent is a ſuit for ſomething by ſomebody who may have, if God pleaſes, an intereſt againſt one who may have, if God pleaſes, alſo an intereſt." Perhaps ſome reliance may be placed upon the rule reſpecting life-inſurances that a creditor has ſuch an intereſt in the life of his debtor that he may inſure it. *Anderſon* v. *Edie*, *Park Inſur.* 432. But there the ſecurity derived from the perſon of the creditor is the ſubject inſured, and indeed the governing principle of all the caſes upon that ſubject will be found to be conſiſtent with the rule contended for by the Plaintiff in error, becauſe they proceed on the ground that no inſurance is good which is not made to inſure ſomething of which the party inſuring is in the actual enjoyment, and which depends upon the duration of life.

Arguments for the Defendants in error. The *Dutch* Commiſſioners were appointed to ſell, manage, and diſpoſe of effects which ſhould be brought into, or which ſhould hereafter come into the ports of this kingdom. But it is inſiſted that the words "to be detained proviſionally" contained in the inſtructions to to the commanders of the King's ſhips, connected with the alteration which took place in the ſtate of things previous to the time at which the ſhips inſured would have arrived in the ports of this kingdom, if not loſt, materially change the character of the Commiſſioners with reſpect to the ſubject inſured. It muſt be remembered however that the policy was dated on the 22d of *Auguſt* 1795, and that the proclamation for reprizals did not iſſue until the 15th of *September* following; at the date of the policy therefore the authority and intereſt of the Commiſſioners was preciſely the ſame as when it firſt veſted in them. Had no proclamation for reprizals iſſued the ſituation of the Commiſſioners would clearly have remained unaltered. Now the order of Council of the 10th *October* empowering the Court of Admiralty to condemn as prize all ſuch *Dutch* ſhips as ſhould be brought in, moſt cautiouſly preſerves the old authority of the Commiſſioners, and referring to the act under which that authority was derived, ſays,

"reſerving

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" reſerving nevertheleſs to the ſaid Commiſſioners the ſale, care, and management thereof, as well before as after final adjudication according to the proviſions of the ſaid act." It is remarkable that in this order of council there is a reference to the Commiſſion, but that the names of the Commiſſioners are never mentioned, and that the ſale, management, &c. is reſerved to them, " according to the proviſions of the ſaid act." Though upon a Proclamation for reprizals the right to all enemies' property ſeized veſts in the Crown *jure coronæ*, ſtill that right is but an inchoate right, and is not complete till condemnation in the Admiralty. Now upon the face of thoſe very inſtructions by which the Admiralty was authoriſed to condemn, and thereby would have completed the right of the Crown if nothing had been added, the Crown itſelf reſtrains the condemnation to the purpoſes of the Commiſſion previouſly iſſued, and prevents that right veſting in the Crown, which if not ſo reſtrained might perhaps have been inconſiſtent with the whole authority of the Commiſſioners. It is true that the original Commiſſion was in its nature revocable, but it is equally true that it was in its terms unlimited, and ſtill remains unrevoked. And though in the order of Council of the 26th of *November* his Majeſty conſtitutes the Commiſſioners Prize Agents for the four ſhips which had gone into the ports of *Ireland*, that proviſion was only made to prevent diſputes reſpecting the diſpoſition of that which might ſeem not to come within the terms of the original Commiſſion which extended only to the realm of *Great Britain*, and it is in that inſtance only that they are treated as prize agents; for in the orders to the Admiralty authoriſing condemnation, the term " prize agents" is never uſed, but they are conſidered as Commiſſioners acting under an old authority. Whether the King or the ſubjects of *Holland* were *ceſtuy que truſts* of the property, this at leaſt muſt be allowed that the *Dutch* under all the circumſtances of the caſe retained their original character of ſtatutable conſignees. With reſpect to the main queſtion raiſed upon this record, whether the *Dutch* Commiſſioners had an inſurable intereſt? there is no pretence for ſaying that this was a wagering policy. The Commiſſioners ſtated to the underwriters the nature of their intereſt and of the property to be inſured, and they only ſeek to recover the amount of loſs ſuſtained upon that property. Without hazarding a definition of inſurable intereſt, it may be ſtated as a principle that when nothing

thing ſtands between the inſured and the poſſeſſion of the property to be inſured, but the perils inſured againſt, he is in a ſituation which entitles him to make the inſurance. It is true that a contract of inſurance is a contract of indemnity, and it is not lawful to make uſe of that contract for the purpoſe of gaming or wagering; but it never has been held neceſſary that the inſured ſhould have a veſted intereſt in the property; and the true queſtion is whether he be intereſted in ſecuring the property from the perils againſt which he inſures. In this caſe had the ſhips not been loſt by perils of the ſea they would have arrived in the ports of this kingdom, and the Commiſſioners would have taken poſſeſſion of them. Suppoſe two ſhips at *St. Helena* of equal value bound for *England*, in one of which a perſon has the abſolute property, and the other is aſſigned to him on condition of her ſafe arrival in the ports of this kingdom. The loſs of either of theſe veſſels by perils of the ſea will equally affect the perſon expecting them, though his title to one would not accrue until her arrival. Would an inſurance upon the latter veſſel be gaming or wagering, or could it be contended upon any principle of reaſon, juſtice, or law, that ſuch an inſurance would not be good? Admitting for the ſake of argument that it was neceſſary before 19 *Geo.* 2. to prove an intereſt unleſs the policy contained a ſtipulation diſpenſing with that proof, the only effect of the ſtatute has been to prohibit the introduction of ſtipulations of that ſort, leaving the queſtion reſpecting the nature of inſurable intereſt upon the ſame footing as before the ſtatute. The caſe of *Tonge* v. *Watts*, though much relied upon by the other ſide, is perfectly conſiſtent with the principles now contended for; the inſurance there was upon freight, and as the goods had never been put on board, the freight had no inception, the ſubject matter of the inſurance had no exiſtence in point of fact, and the riſk therefore never commenced. Here the argument might be concluded, it never having been decided that a veſted intereſt in the ſubject matter of inſurance is neceſſary; but many caſes have come under diſcuſſion in which it has been expreſsly holden that leſs than a veſted intereſt may be inſured. In the caſe of *Grant* v. *Parkinſon* two policies (*a*) were effected, and that upon which the queſtion aroſe was "upon the profits of a cargo of molaſſes." It is impoſſible therefore to

(*a*) Both policies were produced.

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contend that the insurance was upon any thing but profits *eo nomine*. Mr. *Wallace* and Mr. *Dunning* were counsel for the defendant in that case, and they were either convinced that no objection arose from the nature of the interest insured, or if any objection was taken upon that point, it was overruled. That case has now been decided twenty years, and not only has never been overruled, but has since been constantly recognised as law. According to a manuscript note of *Le Cras* v. *Hughes* it appears that Lord *Mansfield* in his judgment referred to *Grant v. Parkinson* as having decided the question of insurance upon profits. Mr. Justice *Lawrence* in *Thomson v. Taylor* again recognised it as having decided the same point; and Lord *Kenyon* in a case of *Barclay* v. *Cousins*, which was an insurance upon profits, and is still depending in the *King's Bench*, said, "in the 22d of *Geo.* 3. a case of *Grant* v. *Parkinson* not to be distinguished from this was decided by Lord *Mansfield*, who having some doubts desired to have the further consideration of the Court; and though that case was argued by Mr. *Wallace* and Mr. *Dunning*, they did not prevail; but the Court, constituted as it then was, were clearly of opinion that it was an insurable interest." From the manuscript note of *Le Cras* v. *Hughes* above referred to, the words of Lord *Mansfield* upon this part of the subject appear to have been particularly strong. He says, "whenever a question has been made since the time of Queen *Anne* the King has always given it (the prize) to the captors. Is the contingency then of the ship coming safe such an interest as the captors may insure? Some interest is necessary, but not any particular form of interest. The question is this, whether this contingency is such a benefit to me as will make it a loss to me if the ship does not arrive? An insurance upon the profits of a voyage was holden the other day to be good. An agent may insure the arrival of a ship which will produce him profit. Here the possession gives the interest in the arrival; yet the vessel may bring material papers to shew that the ship is neutral. It is not a vested interest, but such an expectation as never yet was defeated." Though Lord *Mansfield* may have been mistaken in supposing that the expectation of a grant from the Crown had never been defeated, yet proceeding upon that supposition his reasoning is equally applicable as an authority in this case. The cases of *Kent* v. *Bird*, *Cowp.* 583. and *Lowry* v. *Bourdieu*, *Doug.* 468. clearly shew the opinion of Lord *Mansfield*, that the only

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object of the ſtatute of 19 *Geo.* 2. was to prevent gaming and wagering by policies of inſurance: but he never intimates the neceſſity of the inſured having a veſted intereſt in the property. So Lord *Kenyon* in *Montgomery* v. *Eggington* ſtated the whole queſtion to be "whether it was a colourable inſurance and a gaming policy, or whether it was a *bonâ fide* tranſaction?" In *Boehm* v. *Bell*, 8 *Term. Rep.* 154. which was an inſurance made by the captors of ſhips ſeized as prize, Mr. Juſtice *Groſe* ſays, "It ſeems to me that the whole difficulty has ariſen from confounding an abſolute indefeaſible intereſt with an inſurable intereſt. It is not pretended that the aſſured had the abſolute property in the ſubject of inſurance; neither need they have ſuch property to make the policy legal; it is ſufficient if they had an inſurable intereſt." And according to what was ſaid by Lord *Mansfield* in the caſe of *Le Cras* v. *Hughes* "they certainly had an inſurable intereſt." Mr. Juſtice *Lawrence* in the ſame caſe ſays, it may be aſked in the language of Lord *Mansfield* in *Le Cras* v. *Hughes*, "had not the inſured ſuch an intereſt in the ſhip coming home as to entitle them to an indemnity?" Mr. Juſtice *Buller* in the caſe of *Wolff* v. *Horncaſtle*, *ante*, vol. 1. p. 323. laid it down as clear that a creditor who is to have a lien upon a cargo when it arrives may inſure; and Mr. Juſtice *Heath* in the ſame caſe held, that a contingent and reaſonable expectation of intereſt was ſufficient to entitle a party to inſure. Again in *Curling* v. *Long*, *ante*, vol. 1. p. 636. Lord Ch. J. *Eyre* ſaid, "if goods be ſo ſituated as to create a well grounded expectation of freight being raiſed, it is decided that the freight is inſurable." And in *Page* v. *Fry*, *ante*, vol. 2. p. 243. Mr. Juſtice *Chambre* ſaid "the ſpirit of the 19 *Geo.* 2. only requires, that the policy ſhall not be a gaming policy;" and he therefore held that an intereſt in an hundredth part of the cargo was ſufficient. It has been contended that becauſe in addition to the prohibition enacted by the 19 *Geo* 2. againſt policies in a particular form, the clauſe goes on to ſay, "or without benefit of ſalvage," that therefore no intereſt can be held inſurable where in the event of a loſs there will be no benefit of ſalvage to the underwriter; but the true meaning of thoſe words is, that wherever the ſubject matter of inſurance affords to the underwriter the benefit of ſalvage, that benefit ſhall not be excluded by the contract of the parties. It is ſuppoſed that nothing can be the ſubject matter of inſurance which cannot be abandoned; but where the intereſt

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ariſes upon a lien or upon money lent on bottomry or *reſpondentia*, the inſured has nothing to abandon, and yet there can be no doubt that theſe are good inſurable intereſts. Nor could the inſured in the caſe of *Thompſon* v. *Taylor* have abandoned any thing, the aſſured having had nothing but a right of action againſt the conſignees in caſe the ſhip arrived at the place for which ſhe was chartered. In *Emerigon*, 1 vol. p. 232. it is ſaid to be lawful in *Italy* to inſure profits, but that the ordinances of *Louis* the fourteenth prohibit owners and maſters from inſuring freight, merchants from inſuring expected profits, and ſeamen from inſuring wages; which ſhews that without that expreſs prohibition profits would have been inſurable, and indeed that ſuch an inſurance ſtood on the ſame footing with an inſurance on the two ſubjects to which the ordinance refers at the ſame time. Another argument may be drawn from the practice of inſurance upon lives, which is commonly reſorted to by creditors, in order to ſecure themſelves againſt the death of their debtors, "by which their ſecurity would in ſome degree be leſſened." In *Poſtlethwaite*'s Dictionary, vol. 1. p. 150. it is ſtated as one of the objects of the firſt Life Inſurance Company, that perſons wanting to borrow money might by inſuring the lives be able to give a ſecurity for the money borrowed. The 14 *Geo.* 3. *c.* 48. prohibits any perſon from inſuring the life of another in which he has no intereſt; but many caſes have occurred ſince that ſtatute where creditors have inſured the lives of their debtors; and in *Anderſon* v. *Edie* it was expreſsly decided that they might do ſo, Lord *Kenyon* ſaying, "that a creditor had certainly an intereſt in the life of his debtor, the means by which he was to be ſatisfied might materially depend upon it, and at all events the death muſt in all caſes in ſome degree leſſen the ſecurity". The caſe of *Dwyer* v. *Edie*, *Park.* 432. was alſo an inſurance by a creditor; as was *Stackpole* v. *Simon*, *Park.* 437. and *Willis* v. *Poole*, *Park* 439. In the former of which two caſes Lord *Mansfield* ſays, "as to the intereſt this policy may be conſidered as a collateral ſecurity for a debt due to the Plaintiff;" and in the latter a queſtion was intended to have been made as to the Plaintiff's intereſt, but was diſpoſed of by the Plaintiff's having proved a judgment debt.

The courſe of argument purſued by thoſe learned Judges who thought the judgment of the Court of *King's Bench* ought to be affirmed, was as follows.

Upon this writ of error two exceptions are ſtated to the direction given by the noble Lord at *Niſi Prius*; the firſt is that the ſhips and veſſels inſured were not ſuch ſhips and veſſels as if they had arrived, the Commiſſioners would have been authoriſed to take into their poſſeſſion and under their care and management by virtue of their commiſſion and the act of Parliament; the ſecond objection is that at the time of the ſailing of the ſaid ſhips and from thence until and at the time of the ſeveral loſſes the Commiſſioners were not intereſted in the ſaid ſhips and goods or either of them, to any amount or in any manner whatſoever. In order to underſtand theſe queſtions it will be abſolutely neceſſary to advert to the circumſtances which led to the appointment of theſe Commiſſioners and the nature of the property which was put under their care. The ſtate of *Holland* being ſuch as to render it neceſſary for his Majeſty to open the ports of this kingdom for the reception of thoſe perſons with their property who might find it neceſſary to take refuge from the calamities under which that country laboured, and it being at the ſame time doubtful whether we ſhould be under the neceſſity of commencing hoſtilities with our former allies, orders were iſſued in *January* 1795 to receive all ſuch property as ſhould be voluntarily ſubmitted to our protection, to be taken care of and detained proviſionally. On the 9th of *February* it was found neceſſary to proceed a ſtep further, and orders were accordingly iſſued to the officers and commanders of ſhips to take into their poſſeſſion by force all *Dutch* ſhips bound to or from the ports of *Holland*, for the purpoſe of being brought into this country and detained proviſionally. From that moment it became his Majeſty to do every thing for the owners, which if he had not taken their property into his cuſtody, they might have done for themſelves; to take care that theſe ſhips and goods might be forthcoming for the benefit of their owners, in caſe it ſhould be deemed expedient to reſtore them, or for his own ſubjects or himſelf in caſe hoſtilities between this country and *Holland* ſhould enſue. For this purpoſe the act of 35 *Geo.* 3. *c.* 80. was paſſed, authoriſing his Majeſty to grant that commiſſion which afterwards iſſued on the 13th of *June*. At this time it was manifeſt that ſhips and goods might be taken, the owners of which could not be known, and the object of the act ſeems to have been to ſubſtitute the Commiſſioners under the direction of the King and Council as conſignees of ſuch unknown

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owners for the purpoſe of ſecuring theſe ſhips and cargoes. In this ſtate of things if any ſhips had been brought in the Commiſſioners would have been entitled to take poſſeſſion of them under their commiſſion, and that right continued until the time of the ſeveral loſſes, the commiſſion never having been revoked, but on the contrary ſtudiouſly kept in force for the purpoſe of enabling the Commiſſioners to have the poſſeſſion, care, and management of the ſhips and cargoes. It is ſaid however that the declaration of hoſtilities put an end to the commiſſion; but that is not ſo; the object of the commiſſion was to enable the Commiſſioners to take into their cuſtody all ſuch *Dutch* ſhips as ſhould arrive in this kingdom to whomſoever they might ultimately belong. The declaration of hoſtilities might indeed have made them truſtees for his Majeſty, and he might if he had thought fit have revoked the commiſſion, but not having done ſo they remained his truſtees; and the object of their truſt became definite, whereas before it was indefinite. But it is contended that by a ſubſequent order, the commiſſion was revoked by his Majeſty. Some of the ſhips having been taken to *Ireland* from neceſſity it was thought expedient that an adjudication of prize ſhould be obtained, and for this purpoſe his Majeſty conſtituted theſe perſons his Commiſſioners to claim in the Court of Admiralty. But did this annihilate the firſt commiſſion? No; ſo far from it that the order of the 10th of *October* expreſsly reſerves "to the ſaid Commiſſioners the care, ſale, and management thereof (the ſhips and cargoes) as well before as after final adjudication, according to the proviſions of the ſaid act:" thereby recognizing and confirming the ſaid commiſſion as a ſubſiſting authority. If therefore theſe ſhips and cargoes had arrived in this country they would have come into the poſſeſſion and under the care and management of the Commiſſioners. The ſecond objection is the moſt material. It will not however be neceſſary to enter into a diſcuſſion of the caſes which have been cited at the Bar. It may be admitted that a mere hope or expectation cannot be inſured, and it may therefore alſo be admitted that the next of kin to a perſon in a dying ſtate and incapable of making a will, who has property on the ſea, cannot inſure that property. This caſe was put and much relied upon in the argument; but it is not at all analogous to the preſent. It would be an inſurance not merely againſt the perils of the ſea, but againſt the poſſibility of the recovery of the dying man,

man, of the arrival of the ſhip before his death, of the dying man ſurviving the party inſuring, and of his making a will. Any of which contingencies taking place would prevent any intereſt accruing to the next of kin. It would be impoſſible for a court to weigh the degree of probability or reaſonable expectation which would conſtitute an inſurable intereſt. A rule has been laid down by the Counſel for the *Dutch* Commiſſioners to which no exception has yet been ſuggeſted, *viz.* that where nothing intervenes between the ſubject inſured and the poſſeſſion of it, but the perils inſured againſt, the perſon ſo ſituated may inſure the arrival of ſuch ſubject of inſurance, for he has an intereſt to avert the perils inſured againſt. On the other hand it was contended for the underwriters that nothing could be inſured which was not capable of abandonment. But abandonment affords no criterion of an inſurable intereſt, for neither in bottomry or *reſpondentia* can there be any abandonment, nor could there have been any abandonment of the freight in *Thompſon* v. *Taylor*. It is not ſo clear however that the intereſt inſured in this caſe might not have been abandoned, for if the Commiſſioners are to be conſidered as truſtees they might have abandoned with the conſent or for the benefit of the *ceſtuy que truſts*, whoever they may be, in the ſame manner as other truſtees. Let us conſider the nature of the intereſt which the Commiſſioners took under the commiſſion and act of Parliament. It has been contended from the words of the act of Parliament that the Commiſſioners could have no connection whatever with the ſhips and cargoes until after their arrival in a *Britiſh* port; but the words of the act do not neceſſarily require that conſtruction. The act appoints them Commiſſioners for the management of all *Dutch* ſhips "which have been or may be hereafter detained in or brought into the ports of this kingdom;" that is, *reddendo ſingula ſingulis*, which may be detained in or may be brought into the ports of this kingdom. Now the words "may be brought in," do not ſo neceſſarily exclude the idea of a veſted intereſt in the Commiſſioners until brought in, as if the Legiſlature had uſed the words "ſhall have been brought in." Independent however of theſe obſervations, it is not neceſſary that an inſurer ſhould have a beneficial intereſt in the property inſured; it is ſufficient if he be cloathed with the character of a truſtee, an agent or a conſignee; and if theſe Commiſſioners can be conſidered in either of theſe capacities, they have an inſurable intereſt. According to the terms of the ſtatute it ſeems as if they

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may be conſidered in either of theſe capacities. They may be conſidered as truſtees for the Crown, or for the perſons who ſhall be ultimately entitled to the property; as general agents for the purpoſe of diſpoſing of the property on its arrival in *England*, or as ſtatutable conſignees. It is not neceſſary that the particular *ceſtuy que truſts* ſhould be aſcertained at the moment of the inſurance. Conſidering the true ſpirit of the act, and the objects which it had in view, it was not poſſible more ſpecifically to point out their *ceſtuy que truſts* than has been done; but granting the Commiſſioners to be merely truſtees for perſons unknown, and for objects not preciſely aſcertained at the time when the inſurance was effected, yet if they were truſtees to any purpoſe, they acquired from that character ſufficient intereſt in the truſt property to inſure. Truſtees under the Court of Chancery, truſtees for lunatics, truſtees for infants, truſtees for all who cannot act for themſelves certainly may inſure. And do not theſe Commiſſioners fill a character analogous to theirs, when the property is veſted in them for purpoſes, which however events may turn out, cannot but be beneficial to ſome perſons or other, who at the time are obviouſly incapable of acting for themſelves; nay it might not perhaps be too much to ſay, that repreſenting the character and inveſted with the authority and intereſt of ſuch conſignees, agents, or truſtees, they were not only at liberty but were called upon to inſure the property. It became their bounden duty ſo to do. What was the main purpoſe and object of the act? It was to authoriſe and empower certain perſons to manage, ſell, and diſpoſe of the property "to the beſt advantage;" lodging the whole care, ſuperintendance and conduct of it in them, and giving them ſuch powers as might be neceſſary for effectuating thoſe objects. Nobody can doubt that they would have been juſtified in taking a warehouſe to be ready to receive the goods on their arrival. From the moment the Commiſſion iſſued, they acquired a right of doing every thing which was neceſſary for the protection of the property ſo veſted in them as truſtees. Then was it not neceſſary for the protection of the property that ſome perſons ſhould be authoriſed to inſure? Would they not otherwiſe have been inveſted by Parliament with an imperfect and crippled authority; and is it not to be preſumed that when the Legiſlature delegated to them every neceſſary power for the beſt adminiſtration of the property, it meant alſo to delegate to them what is of more importance the

power

power of protecting and ſecuring the property itſelf? Clearly the Crown had an inſurable intereſt from the moment theſe ſhips were ſeized, and if ſo the *Dutch* Commiſſioners ſtanding in the ſituation of truſtees of the Crown muſt have been inveſted with the ſame intereſt. When the property was taken out of the poſſeſſion of the *Dutch* owners, it was ſcarcely poſſible for them to effect an inſurance, or indeed to aſcertain whether it might be worth while to attempt to inſure property which his *Britannic* Majeſty had taken into his own cuſtody under circumſtances which rendered their intereſt extremely precarious. To prove that the Commiſſioners had no intereſt in the ſubject of inſurance at the time of the loſs, it was ſaid that they could exerciſe no act of ownerſhip over the ſhips or goods while at ſea; that they could bring no action to recover them if detained, or to vindicate any injury done to them; that the perils of the ſea intervened before the commencement of their intereſt, and that they had no right to graſp the property before its arrival. Yet in this reſpect they reſembled many other perſons whoſe intereſt is contingent. The owner of a ſhip acquires no right to freight until the arrival of the ſhip; for though the intereſt commences as ſoon as the goods are put on board, yet by the expreſs words of the charterparty the freight is contingent until the arrival. Suppoſe a ſpecial conſignment to be made to *A* in caſe he ſhould be living or reſident at *London* upon the arrival of the ſhip, he could bring no action in reſpect of the ſhip or goods until their arrival, and yet it can ſcarcely be doubted that he might inſure. Suppoſe a man having property both in *India* and in *England* to die, and make *A* his executor for the management of his property in *India*, and *B* for the management of that in *England*; if *B* receive intelligence that property of the teſtator is upon the ſea on its way to *England*, will it be contended that he might not inſure? He might be a truſtee for unknown perſons, for contingent intereſts, perhaps for infants; it is not neceſſary that it ſhould be known for whom he was a truſtee, but nobody can heſitate to ſay that *ex neceſſitate* he may inſure for the benefit of all thoſe who might be entitled to claim under the truſt. Suppoſe a merchant upon his marriage to covenant with truſtees in his marriage ſettlement that certain ſhips then upon the ſea ſhould when they came to *England* be veſted in them for the purpoſes of the ſettlement, are we to be told that the truſtees might not inſure, becauſe the ſettlor did not in terms convey and aſſign

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over the ſhips immediately? A Court of Equity would conſider the intereſt in the truſtees exactly the ſame as if the ſhips had been immediately conveyed. It is objected however that the *Dutch* Commiſſioners did not reſemble conſignees, becauſe they were directed to ſell and diſpoſe of the property entruſted to them according to the directions which they ſhould receive from Government. But many conſignees receive goods with orders to attend the directions of the conſignor as to their diſpoſal, and yet they are not the leſs able to inſure. So every truſtee is ſubject to the directions either of the *ceſtuy que truſt*, or of the Court of Chancery. The *Dutch* Commiſſioners would not have been at liberty to diſobey the directions of Government from whom their Commiſſion was derived, but in default of directions they like other conſignees and truſtees had the ſole management in themſelves, and might act upon their own judgment. Conſidering the circumſtances which gave riſe to the act of Parliament under which the Commiſſion iſſued, it ought to receive a large and liberal conſtruction from the Court. If Lord *Mansfield* was correct in the caſe of *Le Cras* v. *Hughes* in ſtating that a prize agent had an inſurable intereſt, ſurely theſe Commiſſioners who ſtand in the character of public, parliamentary, and national agents and truſtees had an intereſt which they might legally inſure. The opinion of Lord *Kenyon* in *Craufurd* v. *Hunter* adds much to the weight of Lord *Mansfield*'s great opinion upon this point, where ſpeaking of *Le Cras* v. *Hughes* he ſays, "with one part of that caſe I fully concur, and on that no doubt can be entertained, *viz.* that an agent to a prize has ſuch an intereſt in the ſhips coming home that he may inſure, and in ſo deciding Lord *Mansfield* only proceeded upon principles previouſly ſettled and eſtabliſhed." If therefore it be argued that the intereſt was not complete in the Commiſſioners till the arrival of the ſhips, and that the inſurance therefore was premature, the opinions of Lord *Mansfield* and Lord *Kenyon* give this anſwer, that an inchoate intereſt though imperfect till a given contingency ſhall have taken place is nevertheleſs inſurable. It is not neceſſary in this view of the ſubject to enter into the queſtion how far contingent profits may be inſured, or how it was Lord *Mansfield*'s intention to ſupport inſurances of that kind. Theſe Commiſſioners had not a mere ideal expectation of probable intereſt, but an intereſt veſted in them as truſtees. If indeed at the time of making the inſurance no ſeizure had been made and the Commiſ-

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ſioners had merely ſpeculated upon the probability of future ſeizure, the policy would have been void, as an inſurance upon a mere poſſibility. But in the preſent caſe there was an actual intereſt in the Commiſſioners which nothing could prevent from being reduced into poſſeſſion but the perils of the voyage againſt which the underwriters, with full knowledge of all the circumſtances, undertook to inſure them. From this courſe of reaſoning it follows that the judgment of the Court of *King's Bench* ought to be affirmed.

The learned Judges who delivered opinions to the above effect were *Graham* B., *Rooke* J., *Thompſon* B., *Hotham* B., *Macdonald* Ch. B. and Lord *Alvanley* Ch. J., the latter of whom added, that he was authoriſed to ſay that Mr. Juſtice *Heath*, who was prevented from attending by indiſpoſition, concurred in opinion with the majority of the Judges.

CHAMBRE J. was of a contrary opinion. The queſtions that ariſe in this cauſe are introduced by a bill of exceptions tendered to and allowed by the Noble Lord, before whom the action was tried at *Guildhall*. The ſubſtance of the record has already been ſtated, and I ſhall not repeat the ſtatement at large. The action appears to be brought by the Plaintiffs upon a policy of aſſurance effected by them in their character of Commiſſioners for the care and management of ſuch *Dutch* ſhips and cargoes as ſhould be detained in or brought into the ports of this kingdom. The Defendant is an underwriter on that policy; and the Plaintiffs have declared againſt him in ſeveral counts; but a verdict having been given for the Defendant upon all thoſe counts but the firſt: the queſtions now to be decided ariſe upon that count only, and upon the evidence ſtated in the bill of exceptions as applicable to that count. The ſubject of the inſurance is certain *Dutch* ſhips and cargoes bound for the United Provinces, but which by his Majeſty's orders had been taken at ſea, and carried into *St. Helena*, to be brought from thence into the ports of this kingdom, which was the voyage inſured, and in which the loſs happened: and the material averments are, that if they had arrived the Plaintiffs upon their arrival would by their Commiſſion have been authoriſed to take them under their care and diſpoſition according to the effect of the Commiſſion; that they were intended to be brought to *London* for thoſe purpoſes; that the Plaintiffs as Commiſſioners were intereſted in the ſhips and cargoes to the full amount; and that the

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insurance was made for their use, benefit, and account as Commissioners. The Plaintiffs' Commission, dated the 13th *June* 1795, is set forth in the evidence given by the Plaintiffs, and it conforms to the directions of the 35 *Geo.* 3. *c.* 80. under the authority of which act it was granted, and gives all the powers authorised by that act to be given to such Commissioners. His Majesty's instructions of the 9th *February* 1795 to the Commanders of his ships of war (which are also stated) are to bring into the ports of this kingdom all *Dutch* vessels bound to or for any port in *Holland*; that they and their cargoes being *Dutch* property may be detained provisionally. There is also evidence of the taking of the ships in question under those instructions, and of the formal parts of the declaration respecting the policy, the voyage, and the loss. The rest of the evidence I need not repeat. Whether under these circumstances the Plaintiffs are entitled to recover upon that count of the declaration, on which alone they have taken their verdict, is the matter to be decided. I feel myself in somewhat an unpleasant situation, having reason to believe that the opinion I entertain upon this case may not have any support from the opinions of those to whose superior judgment I have long and justly been accustomed to defer (*a*); but so far as respects the parties in dispute I certainly shall not regret that my opinion is overruled, as I do not see upon what honourable principle the performance of their contract is resisted by the Defendants who have not been deceived, but have made their contract with full knowledge of all the circumstances of the case, though at the same time I think myself bound to declare what I apprehend (however erroneously) to be the legal result of the evidence as applied to the declaration; and I am of opinion that the Plaintiffs ought not to recover, having, as I conceive, had no insurable interest in the subject attempted to be protected by this insurance. Probably as the property in question at the time of the insurance was not the property either of his Majesty or any of his subjects; and the utmost that could be said of it was, that it was in a situation in which it was likely to become *British* property, an effective insurance might have been made upon these ships requiring no proof of interest, but we must take this policy and this declaration as they are, and not as they might have been; and the reasons I have to offer in support of my opinion will apply only to these two points, that the Plaintiffs were under the

(*a*) Mr. J. *Chambre* delivered his opinion immediately after Mr. *B. Graham*, and before the rest of the Judges had spoken.

necessity

neceſſity of proving an intereſt, and that they have failed in doing it. We are much indebted to the great induſtry and ability of the bar in bringing before us all the caſes from whence any principle applicable to the queſtion can be drawn, and in aſſiſting us with every remark that can be uſeful to us in applying thoſe caſes. Indeed we are threatened on both ſides with overturning a ſyſtem, and creating infinite confuſion in the mercantile world which ever way we determine. I do not ſee the caſe exactly in that point of view; on the contrary I think this caſe ſtands ſo particularly on its own baſis, that if we decide againſt the right of action, we diſturb no caſe that has ever been decided and ſanctioned by the profeſſion, or acted upon by merchants, though I fancy at leaſt that by a contrary deciſion, we ſhall have the queſtion of intereſt in ſuch a ſtate that nothing leſs than an act of Parliament, and one that cannot be frittered away by conſtruction, will be ſufficient to fix the legal meaning of an intereſt in caſes of inſurance. Having formed this opinion on the particular circumſtances of the particular caſe, I ſhall travel very little out of it, and ſhall have but very little occaſion to take notice of the multitude of caſes that have been cited. The firſt point to be conſidered is, whether upon the policy and declaration the Plaintiff (if he can recover) can do ſo otherwiſe than as upon a contract of indemnity. I think the Defendant's counſel by the authorities they have cited have proved theſe propoſitions; that by the law of merchants, and particularly by the law of *England* as it ſtood at the time of paſſing the act 19 *Geo.* 2. a wager policy, in which the parties by expreſs terms, ſuch as the words "intereſt or no intereſt," or "without proof of intereſt," diſclaimed the intention of making a contract of indemnity, was then (contrary to older determinations) deemed a valid contract of inſurance, but that a policy containing no ſuch clauſe, diſclaiming or diſpenſing with the proof of intereſt, was to be conſidered as a contract of indemnity only, upon which the aſſured could never recover without proof of an intereſt. *A fortiori* ſuch proof of intereſt was neceſſary, when by the expreſs terms of the policy the parties, as in the preſent caſe, declared the inſurance to be upon intereſt, and that the object of the aſſured was to be indemnified only. It was no anſwer to ſay the policy ſtates what the ſuppoſed intereſt was, and the inſurers were not deceived: the legal conſequence was and ſtill is, that the contract is void; there being no intereſt

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there can be no loſs, and conſequently no indemnity required. This appears by the caſe of *Martin* v. *Sitwell*, 1 *Sho.* 156. and may be collected from other caſes cited in the argument. It ſeems that the ſtatute 19 *Geo.* 2. ſtrongly confirms the doctrine, that an expreſs excluſion of intereſt was neceſſary, becauſe the recital does not ſpeak of wager or gaming policies generally, but only refers to the particular language of the policy by which intereſt was excluded, and in the enacting part that is the firſt thing prohibited. Indeed in the caſe before the Court it has been admitted, and I think properly ſo throughout the argument, that the Plaintiffs were bound to prove an inſurable intereſt; and ſuppoſing that to be ſo it remains to be conſidered whether they have proved it. Much the greater part of the authorities that have been cited have been applied to this latter queſtion; and though they have been obſerved upon with great ingenuity, I cannot diſcover that they have been at all aſſimilated to the caſe before the Court, or that they afford any other argument than this; that inaſmuch as Courts of Law have gone conſiderable lengths in ſome caſes to protect inſurances where the intereſts inſured have been contingent, or in ſome degree uncertain and indirect, they are to go all lengths and conſider every thing an intereſt which the parties chuſe to call ſo. I am not diſpoſed to queſtion the authorities in general; on the contrary there appears to me to have been great propriety in eſtabliſhing the contract of inſurance wherever the intereſt declared upon was in the common underſtanding of mankind a real intereſt in or ariſing out of the thing inſured or ſo connected with it as to depend on the ſafety of the thing inſured and the riſk inſured againſt, without much regard to technical diſtinctions reſpecting property, ſtill however excluding mere ſpeculation or expectation, and intereſts created no otherwiſe than by gaming. What the parties themſelves may do they may alſo do by their truſtees, conſignees, or agents, provided the act done by an agent comes within the ſcope of the authority given him by his principal, either expreſsly or impliedly from the nature of his employment. The inſurance of freight is one of the inſtances relied upon in argument. It would be a ſtrange thing if freight could not be the ſubject of protection by an inſtrument which had its origin from commerce, and was introduced for the very purpoſe of giving ſecurity to mercantile tranſactions. It is a ſolid ſubſtantial intereſt aſcertained by contract,

and

and ariſing from labour and capital employed for the purpoſes of commerce; but even in this caſe the exiſtence of a ſubject out of which freight may ariſe or be earned is neceſſary, as is ſettled by the caſe of *Tonge* and *Watts* lately cited and approved of by Lord *Kenyon* in the caſe of *Thompſon* v. *Taylor*. The inſurance of profits aſcertained by poſitive contract may be equally juſt and reaſonable, and is hardly to be diſtinguiſhed in principle from the caſe of freight. This was the caſe of *Grant* v. *Parkinſon* one of the caſes mainly relied upon by the Plaintiffs, though I confeſs I do not ſee how it applies to the preſent queſtion. A mere ſpeculation on profit is not inſurable. The intereſt of a captor entitled by prize acts or proclamation to have the property condemned to him has an inchoate right. It would be ſtrange indeed if he could not inſure. That he may was ſettled in the caſe of *Boehm* v. *Bell*, *Eaſt Term Rep.* 154. In the caſe of life inſurances it is truly obſerved that the real ſubject of inſurance is the property connected with and depending on the life; the loſs of the life being only the peril by which that property is affected or loſt. The caſes of truſtees, of *ceſtuy que truſts*, of conſignees and agents call for but little obſervation. No doubt a truſtee who has the whole legal eſtate may inſure. The *ceſtuy que truſt* has the beneficial intereſt, ſurely he may inſure. Then as to the agent the queſtion muſt always depend upon the nature of his agency. A prize agent (though there is no decided caſe on the ſubject, and it ſeems uncertain whether Lord *Mansfield* meant that he might inſure the prize or his commiſſion) may poſſibly be entitled to make an inſurance as being authoriſed to do ſo by his principal: but before any caſes on this ſubject can apply it muſt be ſhewn that there was a ſubject of agency exiſting and that the authority was not more extenſive than that which the preſent Plaintiffs had under their commiſſion. I ſhall obſerve no further upon the caſes, but proceed to an examination of the authority which the Plaintiffs really had and the ſtate of the ſubject of the inſurance. For this purpoſe recourſe muſt be had to the Stat. 35 *G.* 3. *c.* 80. on which their commiſſion is founded. The firſt part of the act is only auxiliary to a prior Stat. paſſed in the ſame year and the orders of Council therein recited, and it regards only the property ſecured here for *Dutch* friends who continued to be conſidered as ſuch notwithſtanding the hoſtile inſtructions iſſued on the 19th *February* preceding. Then in the 21ſt ſection the act proceeds to direct meaſures of ſecurity againſt

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thoſe ſubjects of the United Provinces from whom hoſtilities were apprehended. It has reference to the proceedings under the inſtructions, and after reciting that many ſhips of the United Provinces and other ſhips with the goods of ſuch ſubjects on board had been or might thereafter be detained in or brought into the ports of this kingdom, and that ſuch cargoes and ſuch goods and veſſels might periſh and be greatly injured if no proviſion was made reſpecting the ſame. It enacts that the King, with the advice, &c. might grant commiſſions to three or more perſons authoriſing them to take ſuch ſhips and cargoes into their poſſeſſion and under their care, and to manage, ſell, or otherwiſe diſpoſe of them to the beſt advantage according to ſuch inſtructions as they ſhould from time to time receive from his Majeſty, with the advice of the Privy Council. The 38th ſection gives a ſimilar authority with reſpect to the proceeds of ſuch cargoes of ſhips ſo detained, as being of a periſhable nature, had been ordered to be ſold before the act, empowering the Commiſſioners to give the like directions reſpecting ſuch proceeds as if the ſales had been made under the authority of their commiſſion. The ſubject of the commiſſion ſo to be granted is, I think, clearly and plainly deſcribed. It is property actually within the ports of the kingdom not confiſcated but detained by a kind of embargo. The ſole intent of the commiſſion was, I think, to prevent the property in that ſtate from periſhing or receiving damage in our harbours. Such being the intent it gives no general diſpoſing power even to the Council, much leſs to their miniſterial officers the Commiſſioners, who have no power of ſale or abſolute diſpoſition except ſo far as in the diſcretion of the Privy Council ſhould be found neceſſary or expedient to prevent loſs or damage to periſhable cargoes. Acting alone and without the directions of the Council, I do not find that even with reſpect to ſhips and cargoes actually detained their authority extends further than to the care and cuſtody of them. But at the time of the inſurance in queſtion the ſhips had not arrived in *England*: the property was unchanged and remained in the original owners, who had no connection with the Commiſſioners; and without forming an idea of intereſt as ſomething totally unconnected with property, I cannot entertain the opinion that the Plaintiffs have proved an intereſt in themſelves either as owners, truſtees, agents, factors, conſignees, or otherwiſe. How can it be contended that officers merely ap-

pointed by Government for a political purpoſe with powers ſo limited as theirs were, and applied to limited objects within the deſcription of which the property inſured never came, had an inſurable intereſt? Whom do they repreſent? Not the proprietor, he has given no conſent. There can be no implied authority. The full extent of it muſt appear in the commiſſion itſelf. Their ſituation has been compared to that of a conſignee: as it ſtrikes me no two ſituations can be more diſſimilar. By the delivery of the bill of lading the property is veſted in a conſignee though it is a deſeaſible property: he has the controul and diſpoſing power even while the goods are at ſea; he can transfer them by indorſement ſo as to bind even the general owner for a valuable conſideration. Have the Commiſſioners any of theſe powers or any thing like them, or any power at all over the property before arrival? It is ſaid that there was nothing between the aſſured and the property but the perils of the voyage. There were many things. There was the event that has happened, of a declaration of hoſtilities, by which the nature of the property was altered and all poſſibility of its becoming ſubject to the authority of the Commiſſioners under their commiſſion, whatever that authority might be, was at an end. A different direction from Government as to the deſtination of the ſhips and cargoes; even the act of the captain in carrying them into a different kingdom, as happened in reſpect of the ſhips that arrived in *Ireland*; a renewal of amity with *Holland*, any of theſe circumſtances would have had the ſame conſequence: but whether the poſition be true or falſe the great objection appears that there never was any conſignment of theſe ſpecific ſhips and cargoes to the Plaintiffs. If the Plaintiffs were now to recover I really do not know for whom they would be truſtees in reſpect of the damages recovered; but it is not neceſſary to purſue that inquiry. I do not think myſelf obliged, nor do I think a Court of Juſtice ought to ſtrain their faculties for the purpoſe of creating intereſts exiſting only in imagination, and this to defeat the wiſe policy of the Law explicitly declared by the Stat. 19 *G.* 2. It is true this is not a caſe under the ſtatute: but it is a caſe of intereſt, and nothing can conſtitute an intereſt in this caſe which would not conſtitute an intereſt under the ſtatute. The opinion therefore which I think myſelf bound to give upon this judgment is, that it ought to be reverſed.

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A majority of the Judges being of opinion that the judgment of the Court of *King's Bench* ſhould be affirmed, the judgment was accordingly affirmed.

The KING *v.* M'GREGOR.

In an indictment on the 39 *Geo.* 3. *c.* 85. againſt a ſervan for embezzling money received on his maſter's account, it is not ſufficient to follow the words of the ſtatute, but there muſt be a poſitive allegation that the money was the property of the maſter, as in other caſes of larceny.

THIS was an indictment againſt the priſoner on the 39th *Geo.* 3. *c.* 85 (*a*), alleging that he on, &c. at, &c. "then and there being a clerk to *G. S.*, *W. C.*, &c. &c. and employed by them in the capacity of ſuch clerk, did by virtue of ſuch his employment receive and take into his poſſeſſion a large ſum of money, to wit, the ſum of 300*l.* for and on the account of the ſaid *G. S.*, *W. C.* &c., the ſaid maſters and employers of him the ſaid *J. M'Gregor*, and that he the ſaid *J. M'Gregor* afterwards, to wit, on, &c. at, &c. fraudulently and feloniouſly did embezzle and ſecrete the ſaid ſum of 300*l.* againſt the form of the ſtatute in ſuch caſe made and provided, and ſo the jurors aforeſaid upon their oath aforeſaid, do ſay, that the ſaid *J. M'Gregor* then and there, to wit, on, &c. at, &c. feloniouſly did ſteal, take, and carry away the ſaid ſum of 300*l.* from the ſaid maſters and employers of him the ſaid *J. M'Gregor*, on whoſe account the ſaid ſum of 300*l.* was ſo taken into the poſſeſſion of him the ſaid *J. M'Gregor*, being ſuch clerk ſo employed and by virtue of ſuch his employment as aforeſaid, againſt the form of the ſtatute, &c. and againſt the peace," &c.

Upon this indictment the priſoner was tried at the *Old Bailey* Seſſions in *January* laſt and was found guilty, but the judgment was reſpited in order that the opinion of the Twelve Judges might be taken upon the indictment.

Accordingly the caſe was argued on the 5th of *February* before ten of the Judges (*abſentibus* Lord *Kenyon* Ch. J. and *Heath* J.) in the Exchequer Chamber.

(*a*) Entitled "An act to protect maſters againſt embezzlements by their clerks or ſervants." The preamble of the act runs thus: "whereas bankers, merchants, and others are in the courſe of their dealings and tranſactions frequently obliged to entruſt their ſervants, clerks, and perſons employed by them in the like capacity with receiving, paying, negociating, exchanging or tranſferring money, goods, bonds, bills, notes, bankers' drafts and other valuable effects and ſecurities; and whereas doubts have been entertained whether the embezzling of the ſame by ſuch ſervants, clerks, and others ſo employed by their maſters amounts to felony by the law of *England*;" the act proceeds to enact the offence as ſtated in the indictment.

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Knowlys for the priſoner. This indictment cannot be ſupported: for the offence with which it profeſſes to charge the priſoner is a larceny; and if it be a larceny that offence is not ſufficiently alleged. The 39 *Geo.* 3. *c.* 85. after reciting that doubts had been entertained whether the embezzling of money entruſted to ſervants, clerks, and others, amounted to felony by the law of *England*, enacts that if any ſervant or clerk ſhall by virtue of his employment receive into his poſſeſſion any money, goods, *&c.* in the name of or on the account of his maſter or employer, and ſhall fraudulently embezzle, ſecrete, or make away with the ſame he ſhall be deemed to have feloniouſly ſtolen the ſame from his maſter or employer for whoſe uſe, or in whoſe name, or on whoſe account the ſame was delivered to or taken into his poſſeſſion. The Legiſlature therefore having expreſſed doubts whether the ſtealing under the particular circumſtances ſtated amounted to felony at common law, it muſt now be taken that in paſſing that act the Legiſlature did not conſider it as amounting to felony. Now though the act provides that offenders of the deſcription therein ſtated ſhall be deemed to have feloniouſly ſtolen, it does not make ſuch ſtealing a felony *eo nomine*. For wherever a ſtatute raiſes any fact into a felony *eo nomine*, it is always expreſsly enacted that ſuch fact ſhall be deemed a felony, or that the offender ſhall be deemed a felon. Thus in the Coventry act, 22d and 23d *Car.* 2. *c.* 1. *ſ.* 7 it is ſaid that perſons maliciouſly maiming and wounding "ſhall be and are hereby declared to be felons." So it is provided by the Black Act, 9 *Geo.* 1. *c.* 22. that offenders againſt that act "ſhall be adjudged guilty of felony." The ſame words are uſed in the 7 *Geo.* 2. *c.* 21. reſpecting offenders committing aſſault with intent to rob. But the act in queſtion does not declare either that the embezzling ſhall be deemed felony or the offender adjudged a felon; but only refers the facts to a claſs of felonies the properties of which are well known to the common law, *viz.* to the claſs of larceny, and makes a perſon under certain circumſtances a *larron* who would not have been ſo before (*a*). The Legiſlature intended that embezzling the maſter's property by the ſervant, ſhould from that time conſtitute the crime of larceny and no other, as appears from the doubts expreſſed in the preamble, whether it amounted to felony at common law, and from the conſideration that in the few

(*a*) The words are, "ſhall be deemed to have feloniouſly ſtolen the ſame from his maſter," *&c.*

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cases in which the embezzlement of the property of others has been attempted to be treated as a felony, the only question has been, whether it was larceny or not? Thus in *Rex* v. *Meers*, 1 *Show.* 53. a case is cited where a journeyman who had embezzled money received for his master and left it in his chamber in his master's house, and being discharged entered the house in the night and took the money from the chamber, it was held to be no burglary because the taking the money did not amount to felony, that is to larceny, the money not having been taken out of the possession of his master. The same principle seems to have been adopted in *Rex* v. *Bull* cited in *Bazeley*'s case (*a*), 2 *Leach.* 980. ed. 3. This construction of the statute is fortified by the expression "shall be deemed to have feloniously stolen the same," since the "words feloniously stolen" have been at all times used by the Legislature to describe the crime of larceny: as appears from 1 *Ed.* 6. *c.* 12. *s.* 10, and 3 *Ed.* 6. *c.* 3., 8 *Eliz. c.* 4., 22 *Car.* 2. *c.* 5. *s.* 3., 3 *Will.* & *Mar. c.* 9. *s.* 1., 10 & 11 *Will.* 3. *c.* 23. *s.* 1., 12 *Ann*, *c.* 7., and 24 *Geo.* 2. *c.* 45. If then the felony created by this statute be not an embezzlement or feloniously stealing *eo nomine*, but a larceny, it ought to have been described as such in the indictment, and it should not only have been averred that the prisoner feloniously took, stole, and carried away the goods in question, but that those goods were the property of some other person. "Larceny by the common law is the felonious and fraudulent taking and carrying away by any man or woman of the mere personal goods *of another*, neither from the person nor by night in the house of the owner." 3 *Inst.* 107. So in 1 *H. P. C.* 504. the definition of *Bracton* and *Britton* is adopted, which is "*fraudulenta contrectatio rei alienæ cum animo furandi invito domino cujus res illa fuerit.*" It is therefore of the substance of the crime of larceny that the thing stolen should be *res aliena*; and it is laid down in 2 *Hawk. c.* 25. *s.* 60. that "the want of a direct allegation of any thing material in the description of the substance, nature, or manner of the crime cannot be supplied by any intendment or implication whatsoever." If it be said that the crime committed is described in the words of the statute, still if the crime created by the statute be larceny, it must be described as such.

Best Serjt. for the prosecution. This is an indictment on a statute, and where a particular offence is created by a statute it is

(*a*) Which case gave rise to the passing of the 39 *Geo.* 3. *c.* 85.

sufficient

ſufficient to follow the words of that ſtatute in deſcribing the offence. Now the indictment in the preſent caſe ſtates all thoſe circumſtances attending the tranſaction, which under the proviſions of the act conſtitute the offence. It is true that to conſtitute the crime of larceny the property taken muſt belong to ſome perſon; but there is a great difference between larceny at common law and the offence created by this ſtatute, which is a new offence. Where indeed an act of Parliament declares that if a larceny be committed under particular circumſtances, the puniſhment ſhall be aggravated, there it remains a larceny at common law and muſt be treated as ſuch in the indictment. But here the Legiſlature conſidering that thoſe circumſtances which by the act in queſtion are now declared to amount to larceny, did not before that ſtatute amount to that offence, have in terms deſcribed the circumſtances which ſhould for the future be puniſhed as larceny, and have therefore created a new offence and not adapted a new puniſhment to an old offence. If indeed this offence had been larceny before the act, an offender would have ſuffered the ſame puniſhment before the act as he now receives under the proviſions of the act, and the whole enactment would have been nugatory.

At the *Old Bailey* Seſſions in *April* following *Thompſon* Baron delivered the opinion of the Judges that the indictment was defective for the objection taken by his Counſel; for that the new offence created by the act of Parliament being a larceny, it muſt be deſcribed in the indictment as ſuch and with all the properties of a larceny.

LARKINS *v.* LARKINS (*a*).

THE following certificate has been ſent to the Lord Chancellor.

This caſe has been argued before us, and we are of opinion that the deviſe of the eſtate in *Middleſex* to *John Paſcall Larkins* and *Samuel Enderby*, to whom together with *George Smith* the ſaid eſtate was deviſed as joint tenants in truſt to be ſold, was not revoked by the teſtator's having ſtruck out the name of the ſaid *George Smith* after the execution of the ſaid will.

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G. ROOKE.
A. CHAMBRE.

(*a*) Vid. *ante*, p. 16.

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REGULA GENERALIS.

Friday, 12th *February*. It is ordered that from henceforth all arguments upon demurrers and other arguments in this Court be heard on *Mondays* and *Thursdays* only.

ALVANLEY.
G. ROOKE.
A. CHAMBRE.

END OF HILARY TERM.

CASES

1802.

ARGUED and DETERMINED

IN THE

Court of COMMON PLEAS,

IN

Eaſter Term,

In the Forty-ſecond Year of the Reign of GEORGE III.

DURING the *Eaſter* Vacation the Right Hon. *Lloyd* Lord *Kenyon*, Lord Chief Juſtice of the Court of *King's Bench*, died at *Bath*.

Sir *Edward Law* Knight, his Majeſty's Attorney General, ſucceeded to the ſituation of Lord Chief Juſtice of the Court of *King's Bench*, and was created a Peer of the United Kingdom of *Great Britain* and *Ireland* by the title of Lord *Ellenborough*, Baron of *Ellenborough* in the county of *Cumberland*.

The Hon. *Spencer Perceval*, Solicitor General to his Majeſty, ſucceeded to the office of Attorney General.

And *Thomas Manners Sutton* Eſq. Chief Juſtice of the *North Wales* Circuit and Solicitor General to his Royal Highneſs the Prince of *Wales*, was appointed Solicitor General to his Majeſty, and was knighted.

BUCKLER *v.* RAWLINS.

May 6th.

If an appearance be entered in the name of an agent to the attorney for the defendant, and the plea be delivered in the name of the latter, and the plaintiff thereupon enter up judgment for want of a plea, the Court will ſet aſide that judgment for irregularity.

THIS was a rule calling upon the Plaintiff to ſhew cauſe why the judgment ſigned in this action ſhould not be ſet aſide for irregularity.

It appeared that the Defendant had given a warrant of attorney to Mr. *Charles Arnold*, an attorney of this Court, to defend the action, that Mr. *Arnold* had employed Meſſrs. *Cardale*, *Halward* and

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Spear, alſo attornies of this Court, as his agents in the cauſe; that Meſſrs. *Cardale*, *Halward* and *Spear* had given an undertaking to appear, and in purſuance of that undertaking had entered an appearance for the Defendants in their own names; that they afterwards obtained time to plead, and before the expiration of ſuch time delivered a plea in which it was ſtated that the Defendant by *Charles Arnold* his attorney came and defended the wrong and injury when, &c. though the plea was indorſed *Cardale*, *Halward* and *Spear*, agents for *Arnold*; that a plea was afterwards demanded by the Plaintiff, and no other plea having been delivered the Plaintiff ſigned judgment.

Shepherd and *Beſt* Serjts. ſhewed cauſe and contended that the plea was irregular and therefore the judgment was warranted, for that as the appearance was entered in the name of *Cardale*, *Halward* and *Spear*, it was not competent to the Defendant to deliver a plea in the name of *Arnold*, without an order for leave to change the attorney; that the circumſtance which had been ſtated that Meſſrs. *Cardale*, *Halward*, and *Spear*, were only the agents of *Arnold*, could make no difference ſince they had entered the appearance in their own names without making any mention of the principal; and that although Mr. *Arnold* might have received a warrant to defend from the Defendant, yet the Plaintiff could know nothing of that circumſtance and ought not to be affected by it.

Cockell Serjt. *contrà* inſiſted that the Plaintiff's attornies in this caſe had adhered to the uniform practice both of the *King's Bench* and of this Court: as to the former of which he referred to a certificate of the Maſter of the *King's Bench*, and as to the latter he was confirmed by the officers of this Court.

The Court underſtanding that it was the conſtant practice where agents are employed for them to enter an appearance in their own names and afterwards to deliver a plea in the name of their principal, thought the judgment irregular, and obſerved that if the plaintiff had thought proper to ſearch he would have found that the warrant of attorney was given to *Arnold*.

Rule abſolute (*a*).

(*a*) *Shepherd* Serjt. on the next day referred to the Appearance-book, which contained many entries of appearances, wherein it was expreſſed that the attornies appeared as agents and not principals, and urged that it appeared from theſe entries to be the practice for attornies when they appear as agents to ſtate that circumſtance in the *præcipe* from which the appearance is made out by the officer, which had not been done in this caſe. But the Court adhered to their former opinion.

M'CONNELL *v.* HECTOR.

May 10*th.*

A commiſſion of bankrupt founded on the petition of *A.*, a *Britiſh* ſubject reſident in *England* for a debt due to himſelf and his partners *B.* and *C.* alſo *Britiſh* ſubjects, but reſident and carrying on trade in an enemy's country, cannot be ſupported.

THIS was an action of treſpaſs *de bonis aſportatis* directed by the Lord Chancellor for the purpoſe of trying a queſtion of bankruptcy. The Defendant pleaded the general iſſue and two ſpecial pleas in the firſt juſtifying the taking under the ſtatute 13 *Eliz. c.* 7. and in the ſecond under the ſtatute 1 *Jac.* 1. *c.* 15. To both the ſpecial pleas the Plaintiff replied *De injuriâ ſuâ propriâ abſque tali cauſâ.*

The cauſe was tried before Lord *Alvanley* Ch. J. at the *Guildhall* ſittings after laſt *Hilary* term when a verdict was found for the Plaintiff, with liberty for the Defendant to move the Court to ſet that verdict aſide, if, under the following circumſtances they ſhould think the commiſſion of bankruptcy upon which the Defendant relied was valid. The commiſſion iſſued on the petition of the Defendant who was reſident in *England* upon a debt due to himſelf and his two partners *Alexander Reid* and *James Hector* ſubjects of this country but reſident and carrying on trade at that time at *Fluſhing* a port belonging to the enemies of this country.

Beſt Serjt. now moved for a rule to ſhew cauſe why the verdict ſhould not be ſet aſide, and a new trial be had, contending that though it was true that if the debt upon which the petition iſſued was ſuch as could not be ſued for at law it would not be ſufficient to ſupport the commiſſion, yet as all the three joint creditors were *Britiſh* ſubjects, the mere circumſtance of two of them being reſident and trading in an enemy's country would not bar their right to recover; for that in the plea of alien enemy it is neceſſary to aver that the Plaintiff was born out of the King's allegiance (*a*), and that he was adhering to the King's enemies, neither of which circumſtances could have been alleged in this caſe: that the right of a natural born ſubject of the King can neither be forfeited by time or place, but only by his own miſbehaviour, 1 *Bl. Com.* 371, and that as there was no pretence for ſaying that the two perſons who were reſident at *Fluſhing* had ſo adhered to the King's enemies as to

(*a*) See the opinion of *Eyre* Ch. J. in the caſe of *Sparenburgh* v. *Ramazyne*, *ante*, vol. 1. p. 167. from which it ſeems that it is not neceſſary to ſtate the birth of the party in the plea of alien enemy.

be

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be guilty of treaſon, they had not forfeited their right to maintain an action for the debt upon which the commiſſion was founded.

Lord ALVANLEY Ch. J. Moſt certainly every natural born ſubject of *England* has a right to the King's protection ſo long as he entitles himſelf to it by his conduct; but if he live in an enemy's country he forfeits that right. Though theſe perſons may not have done that which would amount to treaſon, yet there is an hoſtile adherence and a commercial adherence; and I do not wiſh to hear it argued that a perſon who lives and carries on trade under the protection and for the benefit of an hoſtile ſtate, and who is ſo far a merchant ſettled in that ſtate that his goods would be liable to confiſcation in a court of prize, is yet to be conſidered as entitled to ſue as an *Engliſh* ſubject in an *Engliſh* court of juſtice. The queſtion is whether a man who reſides under the allegiance and protection of an hoſtile ſtate for all commercial purpoſes, is not to be conſidered to all civil purpoſes as much an alien enemy as if he were born there? If we were to hold that he was not we muſt contradict all the modern authorities upon this ſubject. That an *Engliſhman*, from whom *France* derives all the benefit which can be derived from a natural born ſubject of *France*, ſhould be entitled to more right than a native *Frenchman* would be a monſtrous propoſition. While the *Engliſhman* reſides in the hoſtile country, he is a ſubject of that country, and it has been held that he is entitled to all the privileges of a neutral country while reſident in a neutral country (*a*). I cannot therefore entertain ſufficient doubt upon this ſubject to grant a rule to ſhew cauſe.

ROOKE J. I think we ought not to grant a rule to ſhew cauſe. It is well known that if an alien enemy be reſiding here under the King's protection he may ſue; but if an *Engliſhman* be reſident in an hoſtile country the King cannot enable him to ſue. The reaſon of the diſability of the perſon reſiding in an enemy's country, is, that the fruits of the action may not be remitted to an hoſtile country and ſo furniſh reſources againſt this country. For that purpoſe the caſe of an *Engliſhman* reſiding abroad does not differ from any other perſon. I am of opinion therefore that the petitioning creditor could not have maintained an action in this country for that debt which is the foundation of the commiſſion and conſequently that the commiſſion cannot be ſupported.

(*a*) *Marryatt* v. *Wilſon*, *ante*, vol. 1. p. 430.

CHAMBRE J. The plea of alien enemy is either in bar or abatement of the action. Though I do not controvert what is laid down in general terms in *Blackſtone's Commentaries*, yet I think many diſtinctions ariſe out of that general propoſition, and I have no idea that the preſent commiſſion can be ſupported.

Beſt took nothing by his motion.

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COMBER Adminiſtrator of COMBER *v.* HARDCASTLE and Another.

May 10th.

THIS was an action of aſſumpſit brought by the Plaintiff in his character of adminiſtrator on a ſpecial agreement for the delivery of tallow entered into by the Defendants with the inteſtate in his lifetime. On the trial of the cauſe a verdict having been found for the Defendants a rule *niſi* was obtained calling upon the Plaintiff and *Robert Moate*, *Samuel Morgan* and *Thomas Pickard*, to ſhew cauſe why it ſhould not be referred to the Prothonotary to tax the Defendant's coſts in the cauſe and why the coſts ſo taxed ſhould not be paid to the Defendants by the Plaintiff or by the ſaid *R. M.*, *S. M.*, and *T. P.* This rule was obtained upon an affidavit ſtating that at the trial it was admitted that the ſaid *R. M.*, *S. M.*, and *T. P.*, were the perſons for whoſe benefit the action was brought, and that when the contract upon which the action was founded was produced in evidence it appeared by an indorſement thereon that it had been aſſigned by the Plaintiff to the ſaid *R. M.*, *S. M.*, and *T. P.*, who ſucceeded to the inteſtate's buſineſs and premiſes upon his death, and that it alſo appeared in evidence that the ſaid contract had with the privity and conſent of the ſaid *R. M.*, *S. M.*, and *T. P.*, or one of them (*a*), been annulled.

Plaintiff ſued as adminiſtrator upon a contract made with his inteſtate and aſſigned by the Plaintiff to *J. S.* for whoſe benefit the action was brought. It appearing that the contract had been annulled with the privity both of the Plaintiff and *J. S.* and that the former was indemnified by the latter, and a verdict being found for the Defendant, the Court made an order on the Plaintiff to pay the coſts.

Beſt Serjt. ſhewed cauſe and inſiſted that according to the caſe of *Tatterſall* v. *Groote*, *ante*, vol. 2. p. 253. (*b*), the Plaintiff having ſued in his character of adminiſtrator on a contract made by the inteſtate in his lifetime and which therefore could not be put in ſuit by the Plaintiff in any other character, could not be called upon to pay coſts, and that the other perſons upon whom the rule *niſi* was made in the alternative could not be affected by any order of the

(*a*) It alſo appeared from Lord *Alvanley's* notes that the plaintiff himſelf had abandoned the contract. See the next page.

(*b*) Cited and confirmed in *Cooke* v. *Lucas*, 2 *Eaſt*. 395.

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Court, for though they might in fact be the perſons really intereſted in the ſuit, yet not being in any way before the Court as parties, the Court had no juriſdiction over them for ſuch a purpoſe. He urged that if coſts were awarded upon the record it would be error, and that the Court therefore would hardly do that by indirect means which they had no direct authority to do, and which might not when done be ſubmitted to the reviſion of a court of error. He alſo obſerved that the privilege of the adminiſtrator to be exempt from the payment of coſts where neceſſarily ſuing in that character was not affected by the circumſtance of his ſuing for the benefit of others, ſince in *Wilton* v. *Hamilton*, *ante*, vol. 1. p. 445. an adminiſtratrix ſuing on a policy of inſurance made in the lifetime of her huſband whoſe repreſentative ſhe was, had been held not liable to pay coſts, though the policy had been effected in her huſband's name for the joint benefit of himſelf and two others who were living at the time when the action on the policy was commenced and might have put the policy in ſuit in their own names.

Shepherd and *Vaughan* Serjts. *contrà* were ſtopped by the Court.

Lord ALVANLEY Ch. J. So much has been ſaid in this caſe reſpecting the right of the Court to make this order upon the Plaintiff, (for upon him only and not upon the other perſons who are not parties before the Court the order muſt be made) that I think it neceſſary to ſtate the grounds upon which I feel myſelf bound as a Judge to accede to this application. The Plaintiff (*a*) is the adminiſtrator of a perſon who in his life-time entered into a written agreement to accept a certain quantity of tallow at a particular time and price. After his death this contract being found among his papers, it was ſubmitted to the opinion of his friends whether it would be for the benefit of his eſtate that this contract ſhould be carried into effect; and it being determined that it was better for the eſtate not to run the riſk ariſing from the ſpeculation, an application was made to the Defendants to releaſe the Plaintiffs from the agreement; which was acceded to by the Defendants, and the agreement put an end to. That fact the jury has found. From that time the agreement was mere waſte paper, and whoever put it in ſuit did ſo fraudulently. This paper however was not delivered up to the Defendants, and the price of tallow having

(*a*) Theſe facts were not ſo fully ſtated in the affidavits, but the cauſe had been tried before his Lordſhip.

riſen,

riſen, and *Moate*, *Morgan*, and *Pickard* having ſucceeded to the trade and premiſes of the inteſtate by purchaſe, have this paper aſſigned to them, the effect of which had been previouſly annulled. Though it does not appear upon the affidavits, yet it was avowed at the trial that *Moate*, *Morgan*, and *Pickard* in fact brought the action and indemnified the Plaintiff. The queſtion is, whether under theſe circumſtances we can oblige the Plaintiff to pay the coſts of the action? I admit that an executor or adminiſtrator, neceſſarily ſuing as ſuch, is not made liable to coſts by the ſtatute, and that no coſts can be awarded againſt this Plaintiff on record. But we are to decide whether, as this Plaintiff has been guilty of an abuſe of the proceſs of the Court, we cannot order him to pay the coſts for that contempt? The reaſon why an executor or adminiſtrator is excuſed from the payment of coſts is, becauſe he is not ſuppoſed to know the imbecillity of his own ſuit; which reaſon by no means applies to the preſent Plaintiff. It has been ſuggeſted by my brother *Rooke*, that where an executor or adminiſtrator introduces coſts by his own neglect, as where he ſuffers himſelf to be nonproſſed, he is liable to the payment of thoſe coſts. And certainly it does not follow from the ſtatute not having given coſts againſt executors or adminiſtrators, that where executors or adminiſtrators lend their names to other perſons improperly, the Court has no authority to puniſh them.

ROOKE J. I am of the ſame opinion. It is clear upon the ſtatute that where an executor or adminiſtrator neceſſarily ſues as ſuch he is not liable to coſts. And yet it has been holden that where an executor or adminiſtrator is guilty of miſbehaviour he ſhall pay coſts. As where he ſuffers himſelf to be nonproſſed (*a*); ſo where he has knowingly brought a wrong action, or otherwiſe been guilty of a wilful default, he ſhall pay coſts upon a diſcontinuance (*b*), or for not proceeding to trial according to notice (*c*). Then if the Courts have ſo far got the better of the ſtatute as to make executors and adminiſtrators pay coſts in theſe caſes, I ſee no reaſon why an adminiſtrator ſhould not pay them where he brings an action contrary to his own agreement. I am therefore

(*a*) *Lamley* v. *Nicholls*, *Co. Ca. Pr.* 14. *Hawes* v. *Saunders*, 3 *Burr.* 1584. and *Higgs* v. *Warry*, 6 *T. R.* 654.

(*b*) *Haydon* v. *Norton*, *Co. Ca. Pr.* 79 *Barnes* 169. ed. 3. S. C. *Harris* v. *Jones*, 3 *Burr.* 1451. 1 *Bl.* 451. S. C. *Bennet* v. *Coke*, and 4 *Burr.* 1927.

(*c*) *Anon.* 7 *Mod.* 98. 118. *Elwes* v. *Mocata*, 2 *Ld. Ray.* 865. 1 *Salk.* 314. S. C. But where the omiſſion to proceed to trial does not ariſe from the plaintiff's own default he ſhall not pay the coſts. *Ogle* v. *Moffat*, *Barnes*, 133. ed. 3.

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of opinion that we ought to make an order upon the Plaintiff to pay theſe coſts.

CHAMBRE J. I am of the ſame opinion. With reſpect to the caſe of *Wilton* v. *Hamilton* which has been cited, the action was fairly brought by the executrix in reſpect of an intereſt claimed as due to the teſtator's eſtate; and though it were competent to either of the other two perſons, who were jointly intereſted with the teſtator, to have brought the action, yet as the action was *bonâ fide* brought by the executrix, who had a right ſo to do for the benefit of the eſtate, there could be no pretence for making her pay the coſts. The caſe of *Tatterſall* v. *Groote* proceeded entirely upon the conſtruction of the ſtatute reſpecting coſts. But here the caſe is quite different. A complaint is now made againſt the Plaintiff of a fraudulent abuſe of the proceſs of the Court in lending his name to other perſons. This is a groſs fraud. And what is there in the ſtatute of coſts which prevents the Court from puniſhing the Plaintiff for ſuch miſbehaviour?

Per Curiam, In drawing up the rule let it be referred to the Prothonotary to tax the Defendant's coſts, and let it be ordered that the Plaintiff do pay the ſame. The judgment muſt be entered without coſts.

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WINDER *v.* WOOD.

The judgments in an original action and the judgments in the actions againſt the bail may be ſet aſide upon one motion and one affidavit entitled in the original action.

A Rule having been obtained to ſhew cauſe why the judgment in the original action between theſe parties, as well as the judgments in the actions againſt the bail, ſhould not be ſet aſide;

Vaughan Serjt. objected that the rule had been obtained upon one motion only, and one affidavit entitled in the original action, whereas he contended there ought to have been ſeveral motions and ſeveral affidavits.

But *The Court* were of opinion that the rule had been obtained according to the uſual practice; and that if the judgment in the original action failed the ſubſequent actions muſt fail alſo.

Bayley Serjt. for the Defendant.

RICHARDSON *v.* GOSS. *May* 12th.

TROVER for goods.

This cauſe was tried before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after laſt *Michaelmas* Term, when the following facts appeared in evidence. The goods in queſtion (conſiſting of 118 hams and 25 ſides of bacon) were ſhipped by the Plaintiff, who was a dealer in bacon and hams at *Newcaſtle*, on board the *Formoſa*, directed to a perſon of the name of *Wilſon* in *London*, by whom they had been ordered. On the 1ſt of *June* 1801, *Wilſon* wrote and ſent the following letter to the Plaintiff at *Newcaſtle*. "This ſerves to acquaint you that from a heavy diſappointment I am deprived anſwering my engagements. It is diſtreſſing to ſay I am under the neceſſity to refuſe my acceptances, the more ſo as your account is the heavieſt I have. This unforeſeen accident is cauſed by the embargo in the *Baltic*. I flatter myſelf by having time I ſhall ſurmount my difficulty, but if that cannot be allowed I muſt give every thing I have in ſatisfying my creditors. I have received the 4 hogſheads per *Neptune*, *Parkinſon*, *but ſhall not apply for the* 3 *hogsheads by the* Formoſa. Little did I think this would have been the caſe, or I would never have ordered any goods from you. Nevertheleſs if I meet with candour and patience I ſhall be able to ſurmount all my difficulties." This letter reached the Plaintiff at *Newcaſtle* on the 3d of *June*, and by return of poſt, *viz.* the 4th of *June*, the Plaintiff wrote to *Wilſon* ſaying, "If I find you an honeſt man you ſhall have every indulgence from me," but making no mention of the goods on board the *Formoſa*. As ſoon as the arrangement of his concerns would permit the Plaintiff ſet off from *Newcaſtle* for *London*, and arrived on the evening of the 7th of *June*. Previous to the letter of the 1ſt of *June*, *viz.* on the 22d of *May*, *Wilſon* had directed the Defendant, at whoſe wharf goods were uſually landed for him and kept till ſent for, to receive the goods coming by the *Formoſa*, and had accompanied his directions by an order to the Captain of the *Formoſa*, in the uſual form, to deliver them to the Defendant

A. of *Newcaſtle* ſhipped goods for *London* to order of *B.*: before their arrival *B.* wrote to ſay that he was in failing circumſtances, and would not apply for the goods on their arrival; to this *A.* returned a general anſwer, without making any mention of the goods, but immediately left *Newcaſtle* for *London*, and on his arrival applied at the wharf of *C.*, where the goods had in the mean time arrived, (and where goods ſhipped for *B.* uſually were landed and kept till ſent for by him) tendering the freight and charges paid for the goods, and requiring a delivery of them, which was refuſed unleſs upon payment of a general balance due from *B.* to *C.* for wharfage; Held that the contract as between *A.* and *B.* having been reſcinded previous to the arrival of the goods, *C.* had no right to retain againſt *A.* for a general balance due to him from *B.*

Semble, that the goods were no longer *in tranſitu* when arrived at the wharf of *C.*, where the goods of *A.* were uſually landed and kept.

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or bearer. *Wilſon* was indebted to the Defendant to a conſiderable amount on a former account, as well as for the freight and charges of the goods in queſtion, which arrived at his wharf on the 4th of *June*, and which the Defendant, not having been informed by *Wilſon* of his letter of the 1ſt of *June* to the Plaintiff, paid. The Plaintiff on his arrival in *London* demanded the goods in queſtion, and tendered to the Defendant the freight and charges; but the Defendant refuſed to deliver them up unleſs upon payment of the general balance due to him from *Wilſon*. The jury found a verdict for the Plaintiff; but liberty was reſerved to the Defendant to move to have that verdict ſet aſide and a verdict entered for himſelf, if the Court ſhould think him entitled thereto in point of law.

Accordingly a rule *niſi* for that purpoſe having been obtained in the courſe of laſt term

Bayley Serjt. ſhewed cauſe. The preſent verdict may be ſupported upon two grounds, 1ſt, That the goods in queſtion before they came to the poſſeſſion of the vendee were ſtopped *in tranſitu* by the vendor: 2dly, That the contract having been reſcinded by the conſent of the parties before the goods came to the wharf of the Defendant, the property in them reveſted in the Plaintiff, and conſequently the Defendant has no lien upon them but for the amount of the freight and charges. With reſpect to the 1ſt ground it is to be obſerved, that till the arrival of the goods at the Defendant's wharf they were moſt clearly *in tranſitu*, and that the mere landing them at the wharf does not put an end to the *tranſitus*, ſince the wharf of the Defendant was not the ultimate place of their deſtination. That the right of the vendor to ſtop *in tranſitu* is not put an end to by delivery of goods to an agent appears from the caſe of *Hunter* v. *Beal*, cit. 3 *T. R.* 466. where a delivery to an inn-keeper on their way to the vendee, was held not to affect the vendor's right, though the inn-keeper had informed the vendee of his receipt of the goods for him, and actually ſent them to a quay to be ſhipped on account of the vendee in obedience to his orders, but being too late to be ſhipped, they were ſent back to the inn-keeper, and afterwards claimed by the vendor. [*The Court* ſeemed to incline againſt the Plaintiff upon this point, becauſe *Wilſon* appeared to have uſed the Defendant's wharf as his own warehouſe, and expreſſed a wiſh rather to hear the ſecond point argued.] *Wilſon* having propoſed to the Plaintiff on the 1ſt

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of *June*, when the goods were certainly *in tranſitu* that the contract ſhould be reſcinded, and the plaintiff having acceded to that propoſal, the goods muſt be conſidered as having reveſted in the Plaintiff from the 1ſt of *June*. That it was competent to *Wilſon* to reſcind the contract under the circumſtances in which he ſtood appears clearly from *Atkin* v. *Barwick*, 1 *Str.* 165. the deciſion of which caſe has been uniformly approved, though the reaſons on which the judgment proceeded have been ſometimes impugned; as in *Harman* v. *Fiſher*, *Cowp.* 125. and *Neate* v. *Ball*, 2 *Eaſt.* 124. That caſe decides that although the goods reach the vendee, yet if he refuſe to accept them, ſuch refuſal will have the effect of reſcinding the contract from the time of the refuſal, though the aſſent of the vendor is not given till afterwards. In the caſe of *Salte* v. *Field*, 5 *T. R.* 211. where the contract was reſcinded by a countermand of a prior order of the goods by the vendee, the *jus tertii* had as in this caſe intervened, for the goods had been attached in the hands of the vendee's packer. Immediately on the receipt of *Wilſon*'s letter the Plaintiff came up to town, and the firſt thing he did was to demand his goods from the Defendant; if there was no poſitive aſſent therefore to the reſcinding of the contract by the Plaintiff, ſtill his conduct evinced that aſſent moſt unequivocally. If then the contract were reſcinded from the 1ſt of *June*, when the goods arrived at the Defendant's wharf they were the property of the Plaintiff and not of *Wilſon*, conſequently the Defendant could have no lien for the general balance due from the latter, and this defence muſt be conſidered as an attempt on his part to diſcharge the debts of *Wilſon* with the Plaintiff's property.

Shepherd Serjt. in ſupport of the rule. The Defendant having a lien for his general balance upon all goods belonging to *Wilſon* which ſhould come into his hands, and having received the goods in queſtion from *Wilſon* under an order given to him for that purpoſe, he has in fact received them in the nature of a pledge. Now no caſe can be ſtated in which the vendee of goods has been allowed to reſcind the contract ſo as to diveſt the rights of a third perſon. So many obſervations have been made upon the caſe of *Atkin* v. *Barwick*, that it cannot be conſidered of any very great authority: and indeed that caſe goes no further than to determine that where the vendee offers to reſcind the contract before he has done any act to give any right in them to a third perſon, and that offer is accepted

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by the vendor, the property in the goods is revested in the latter. With respect to *Salte* v. *Field*, the contract as between the parties was determined to have been rescinded before the goods came into the hands of the packer: but in that case the packer claimed no lien; consequently the case affords no ground for deciding against the lien of the Defendant. In the late case of *Neate* v. *Ball*, the Court of *King's Bench* decided against the attempt of the vendee to rescind the contract after the goods had once been received; for though it was before the act of bankruptcy, yet being in contemplation of it, the attempt was held void. In this case the Plaintiff derives his right to take back the goods under the letter of the 1st of *June*, that is under an act of *Wilson* before the delivery of the goods, but not communicated to the Defendant. The attempt therefore to rescind the contract on the part of *Wilson* was a secret act in fraud of the Defendant, who received the goods upon the faith of the lien for the general balance of accounts. Had the circumstance been communicated to the Defendant before the delivery it would have been otherwise: and possibly the Defendant was induced to forbear arresting *Wilson* for the debts due to him upon the expectation of discharging the balance by the goods directed to his wharf. The whole therefore of the Plaintiff's claim is made through an act done by *Wilson* in fraud of the Defendant. It may be observed moreover that the answer of the Plaintiff to *Wilson*'s offer to rescind the contract is not a direct assent, but leaves the matter open to be decided upon as he should find most advantageous upon his arrival in *London*. Now in *Smith* v. *Field*, 5 *T. R.* 402. it was decided that unless there be an assent of the vendor the contract is not rescinded. The present case differs essentially from that of a stoppage *in transitu*, where the right to take the goods arises out of the original property of the consignor: but here when the goods were seized the *transitus* was at an end, and the only right to take them was derived from an agreement of the vendee to rescind the contract: the Plaintiff therefore claimed under the vendee, and before he could take the goods he ought to have satisfied all the charges to which the latter might have subjected them. If *Wilson* instead of rescinding the contract had sold the goods to a stranger, could such a person have taken them out of the hands of the Defendant without satisfying the general balance? If then such a purchaser could not, neither could the Plaintiff, for both must equally claim under *Wilson*.

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Lord ALVANLEY Ch. J. Suppoſe a wharfinger to have a general authority to receive all goods directed for *A. B.*, and that goods come to his wharf by miſtake directed for *A. B.* It is quite clear that the real owner of the goods could not take them away without paying the charges incident to thoſe particular goods: but it is equally clear that the wharfinger could not ſet up a lien on ſuch goods for a general balance of accounts due from *A. B.* to him. The queſtion therefore is, Whether the contract between the Plaintiff and *Wilſon* was not completely put an end to before the goods were received? And unleſs it can be ſhewn that the goods did not come into the hands of the Defendant, as the goods of the Plaintiff, it appears to me that the latter will be entitled to recover. If indeed the Defendant had been induced to advance money or accept bills upon the expectation of the arrival of the goods, he might have acquired a lien upon them to the amount of the credit given upon thoſe ſpecific goods, the party to whom ſuch credit was given having had a right to direct the goods to his wharf at the time when it was given. This was the caſe of *Hammonds* v. *Barclay* (*a*). But it would be going too far to ſay that becauſe *Wilſon* omitted to countermand his order when he ceaſed to have any right over the goods the Defendant is entitled to a lien upon thoſe goods for the general balance due from *Wilſon*. Notwithſtanding therefore any doubts which I may have entertained upon the ſubject I am now clearly of opinion that the Plaintiff is entitled to recover. No queſtion ariſes in this caſe between the aſſignees of *Wilſon* and the Plaintiff reſpecting the intervention of any act of bankruptcy: it was therefore clearly competent to *Wilſon* on the 1ſt of *June* to revoke the order which he had given to *Richardſon*, and to renounce his right to any goods on their paſſage provided *Richardſon* would permit him ſo to do. On the 1ſt of *June* then *Wilſon* writes that he ſhall not apply for the three hogſheads by the *Formoſa*; and this letter is received at *Newcaſtle* on the 3d of *June*. It has been contended that the anſwer to this letter does not amount to an acceptance on the part of the plaintiff of the offer made by *Wilſon* to determine the contract; but it does appear to me that, ſhort of a poſitive expreſſion of acceptance, it is as ſtrong an acceptance as could be ſignified; and the Plaintiff muſt have reaſoned unlike other men not to have aſſented to reſcind a contract, the execution

(*a*) 2 *Eaſt.* 227.

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of which would be disadvantageous to himself. Immediately after answering *Wilson*'s letter of the 1st of *June*, the Plaintiff set out for *London*, and on his arrival in *London* shewed no hesitation in taking to the goods, but on the contrary claimed them directly from the Defendant. It is true that the Defendant having received the goods without being informed of *Wilson*'s letter had executed the authority given him by *Wilson* before the Plaintiff's arrival: and unquestionably it was an act of neglect in *Wilson* not to inform the Defendant that the contract between himself and the Plaintiff was determined, and that the Defendant was not to receive the goods on his account; which omission if it had been wilful would have amounted to a fraud in *Wilson*. But this circumstance will not affect the Plaintiff's right if he assented to *Wilson*'s offer: and I do not feel that we shall violate any principle of law in considering the conduct of the Plaintiff as amounting to such assent. The Plaintiff tendered to the Defendant the freight and charges on the goods in question, which the latter refused, contending that by the custom of the trade, which is now considered as having become part of the contract between wharfingers and their customers, he was entitled to retain them for his general balance due from *Wilson*. It is true that as between the Defendant and *Wilson*, if the former had received the goods on *Wilson*'s account and as belonging to him, the Defendant would have had a right so to retain them. But the question now is, Whether he can retain against *Richardson* for a balance due from *Wilson*, he the Defendant having got the goods into his hands without having been informed that the Plaintiff and *Wilson* had previously agreed to put an end to the contract? It is singular that the case of *Atkin* v. *Barwick* should have been often cited with disapprobation and never overturned, but that different judges should have supposed it to have proceeded upon different grounds. The true ground however seems to be that mentioned by Lord *Mansfield* and Lord *Kenyon* that the goods had never been accepted by the trader. Had the packer in the case of *Salte* v. *Field* set up a lien for his general balance that would have been precisely this case. But in that case the vendee had previous to the receipt by the packer countermanded the goods, to which countermand the vendor assented after an attachment had issued, though the goods were in fact deposited with the packer which ought not to have been so deposited; and the only question was, Whether the property reverted to the vendor so as to avoid the intermediate

attachments

attachments of the creditors. Now I do not ſee any real diſtinction between the two caſes. For although the queſtion upon the lien of the packer did not ariſe, yet I do not ſee how the Defendant is to be diſtinguiſhed from any other creditor of *Wilſon* not claiming under a ſpecific lien, but deriving his right to affect the goods under a debt due from *Wilſon*. I admit that if *Wilſon* had received money from the Defendant or the latter had accepted bills upon the faith of theſe goods, the Defendant would have had a right to retain, becauſe the Plaintiff had inveſted *Wilſon* with a power to make them liable to ſuch a claim. But in the preſent caſe I am of opinion that common juſtice requires that the lien of the Defendant ſhould not be extended beyond what was actually advanced by him upon theſe particular goods: and as the amount of all the charges incident to theſe goods was tendered by the Plaintiff, I think that he is entitled to recover.

HEATH J. I am of the ſame opinion. It was perfectly competent to the vendor and vendee to reſcind the contract: and I think that the contract was reſcinded by relation upon the 1ſt of *June*. This caſe differs from a caſe of bankruptcy: for there if any act of bankruptcy intervene between the offer to reſcind and the aſſent, the aſſent comes too late to prevent the operation of the act of bankruptcy (*a*). Here therefore I think that the relation muſt take place agreeable to the reaſoning made uſe of in *Atkin* v. *Barwick*; which though it has been thought by Lord *Mansfield*, Lord *Kenyon*, and other Judges, not to have been applicable to that caſe, is applicable to this. Here the wharfinger had no right to retain the goods againſt *Richardſon*, who was no creditor, in reſpect of any thing but what had been laid out upon them: though if *Wilſon* had demanded the goods the wharfinger would have had a right founded on cuſtom to retain for his general balance. In this caſe no fraud appears, nor any ſuſpicion of fraud, but a mere act of negligence on the part of *Wilſon*, who certainly ought to have given notice to the Defendant of his having put an end to the contract. The title of *Richardſon* was the preferable title: under theſe circumſtances therefore the wharfinger has no right to ſet up any lien againſt him for the general balance of accounts due from *Wilſon*.

ROOKE J. I am of the ſame opinion. I do not think that there is any occaſion in this caſe to enter into the queſtion reſpect-

(*a*) See *Smith* v. *Field*, 5 *T. R.* 402.

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ing the ſtoppage *in tranſitu*. The only queſtion is, Whether the contract was reſcinded before the goods got into the poſſeſſion of the Defendant. *Wilſon* the bankrupt acted with great propriety and honeſty in writing to the Plaintiff to ſay that he would not accept the goods: and according to the caſe of *Atkin* v. *Barwick*, which deciſion has at different times been confirmed, he had a right ſo to do. Immediately on the receipt of *Wilſon*'s letter the Plaintiff left *Newcaſtle*, and on his arrival in *London* conſidered the contract as reſcinded. In *Neate* v. *Ball*, Lord *Kenyon*, ſpeaking of the caſe of *Atkin* v. *Barwick*, ſays, "The trader finding himſelf in a failing condition very honeſtly did not accept the goods but returned them, and if the goods were not accepted the judgment was right." So in this caſe *Wilſon* refuſed to receive the goods. As between the parties to the contract therefore the contract was reſcinded. Then who objects? It is a perſon who claims under *Wilſon*. But the Plaintiff's title to the goods is paramount to the title of any perſon who claims under *Wilſon*. The doctrine of general liens is referable to ſpecial agreement, as was obſerved in *Oppenheim* v. *Ruſſell* (*a*); and I think that doctrine is not to be favoured, becauſe all perſons who claim under them muſt have been guilty of neglect in ſuffering goods, upon which the law had given them a ſpecial lien, to go out of their hands without endeavouring to indemnify themſelves by ſetting up a claim for a general lien. I ſhall never unleſs bound by authority aſſent to the doctrine that theſe general liens are to affect the rights of third perſons, not claiming under thoſe from whom the right to the lien is derived. The Defendant claims under *Wilſon*, and had no more than a bare authority from him to receive the goods, which authority was dated in *May*, when there was no ſuſpicion that *Wilſon* was likely to be involved. And though he afterwards forgot to countermand this authority, when he had reſcinded his contract with the Plaintiff, yet the Defendant had nothing more than a bare authority to receive the goods. I am therefore of opinion that he had no right to ſet up this general lien againſt the right paramount of the Plaintiff.

CHAMBRE J. If there be any caſe in which it would be juſtifiable to ſtrain the law for the purpoſe of ſupporting a lien, yet I do not think that there is any reaſon for doing ſo in this: for if this defence be ſuſtained the effect will be, that we ſhall direct

(*a*) *Ante*, p. 42.

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the debts of one man to be paid by the effects of another. Two queſtions have been made. Firſt, Whether the *tranſitus* were at an end? And if it were neceſſary to decide that, I ſhould ſtrongly incline to think that if a man be in the habit of uſing the warehouſe of a wharfinger as his own, and make that the repoſitory of his goods, and diſpoſe of them there, that the journey would be at an end when the goods arrived at ſuch warehouſe. The ſecond queſtion, Whether the contract were reſcinded? is the principal queſtion to be conſidered. It may be obſerved that the caſe of *Atkin* v. *Barwick* has ſtood very near a century; and though it has been much commented upon, yet its authority in the main has been preſerved. It is true that there are ſome very peculiar circumſtances in that caſe. Seventeen days intervened after the goods had been ſent out of the poſſeſſion of the conſignees before any notice was given to the conſignors of their intention not to accept them; and it does not appear that the perſon to whom they were ſent had any connection with the conſignors: perhaps therefore if a caſe preciſely ſimilar to *Atkin* v. *Barwick* were now to ariſe it would not receive the ſame deciſion. Since the time when that deciſion took place a new diſtinction has ariſen reſpecting preference given to one creditor over the reſt in contemplation of bankruptcy: and perhaps that diſtinction would have been ſufficient to ſet aſide the tranſaction in that caſe. But the objections do not reſt here. For when advice was given to the conſignor that the conſignees had ſent away the goods the bankruptcy had taken place. Under theſe circumſtances it might be difficult now to ſupport the caſe as it was then decided: and it is remarkable that when this caſe has been mentioned upon various occaſions, it has conſtantly been found fault with, and yet the Judges have never particularly ſtated the parts with which they quarrelled, but have always confirmed the caſe upon the whole, and holden the deciſion to have been right. One main point was this, that the Court would preſume an aſſent on the part of the conſignors: and in that caſe it was neceſſary that they ſhould do ſo, for the conſignors had no opportunity of expreſſing their aſſent until 19 days after the goods were ſent away, and two days after the act of bankruptcy had taken place. In the preſent caſe *Wilſon* never received the goods: and indeed ſome days before they came to the hands of the wharfinger he wrote a letter to the conſignor ſignifying his intention not to receive them, which letter was received by the conſignor the day before the goods arrived at

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the wharf. If an actual aſſent were neceſſary, the Plaintiff's anſwer to that letter ſeems to me to amount to an aſſent. It is true he reſerved to himſelf a power of judging of the conduct of *Wilſon*: but he immediately ſet out for *London* and on his arrival there demanded the goods; and if an actual aſſent could not be preſumed, I think that would be evidence that an aſſent was given. Indeed the terms of *Wilſon*'s letter were ſo ſtrong that it was hardly neceſſary for the Plaintiff to endeavour to ſtop the goods; for *Wilſon*'s expreſſion is that he ſhall not apply for them. I will not go over the other caſes. It has been contended however that the tranſaction is a fraud on the wharfinger. But before fraud can be committed there muſt be ſome right. Now the wharfinger had a mere naked authority: and any diſpoſition made by the perſon who gave ſuch an authority muſt put an end to it. It has been argued that the wharfinger might have extended his credit to *Wilſon* upon the aſſurance of the arrival of the goods: but that is a ſpeculation which the law does not allow; for there can be no lien until poſſeſſion. On the arrival of the goods the wharfinger is put to ſome trouble and expence for which he has a lien upon the proprietor of the goods: but the lien now claimed is an extenſion of that lien; and if he had had former dealings with *Richardſon* he might have ſet up a general lien againſt him. The lien whether general or ſpecial muſt be againſt the proprietor, which in the preſent caſe was the Plaintiff.

Per Curiam, Rule diſcharged.

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MACLEAN *v.* DOUGLASS.

The Court refuſed to ſet aſide upon ſummary application a judgment entered up on a warrant of attorney given by a feme covert

BAYLEY Serjt. moved for a rule to ſhew cauſe why the judgment in this caſe, which had been entered up by virtue of a warrant of attorney given by a feme covert, ſhould not be ſet aſide. He ſtated that the judgment had been entered up more than a year, but obſerved that as it might clearly be ſet aſide upon a writ of error, the Court might perhaps grant relief in this ſtage of the proceedings in order to avoid putting the Defendant to unneceſſary expence and delay.

But *The Court* refuſed to grant a rule: and CHAMBRE J. ſaid, that he remembered a caſe in which he had moved the Court of *King's Bench* for leave to plead coverture in abatement, after the

regular time for pleading in abatement had elapſed, ſtating that the matter which he applied for leave to plead would afford ground for a writ of error, and conſequently that if the action were ſuffered to proceed, the judgment might be reverſed; but the Court refuſed a rule to ſhew cauſe, and the judgment was afterwards reverſed for error.

Bayley took nothing by his motion.

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TRESPASS for taking the Plaintiff's goods. Plea. Not guilty.

The cauſe was tried before Lord *Eldon* Ch. J. at the *Weſtminſter* Sittings after *Hilary* Term 1801, when the jury found a ſpecial verdict which ſtated in ſubſtance as follows.

The Maſters in Chancery are not rateable as occupiers of their reſpective apartments in *Southampton Buildings* under the paving act 11 *Geo.* 3. 22.

In purſuance of the 32 *Geo.* 3. *c.* 42. and before the making of the rate hereinafter mentioned, a ſum of money not exceeding 300,000*l.* belonging to the ſuitors of the Court of *Chancery* was inveſted in Government Securities under the direction of the ſaid Court, and out of the intereſt certain ſums not exceeding 30,000*l.* were applied in purchaſing ground, and in building and completing the offices and repoſitories hereinafter mentioned, and in paying other expences relating to the execution of the act. A proper piece of ground lying in *Saint Andrew Holborn* above the bars, with ſuch houſes and buildings as were then ſtanding thereon, was purchaſed out of the ſaid money, and by indentures of bargain and ſale inrolled, conveyed to our ſovereign Lord the King, his heirs and ſucceſſors, for the purpoſes and in purſuance of the ſaid act, whereby the King became ſeiſed thereof in fee in right of his crown for the purpoſes of the act: and out of the ſame money proper and convenient offices for the maſters in ordinary in *Chancery* and their clerks, and for the ſecretaries of bankrupts and lunatics, and their clerks, and ſafe and ſecure repoſitories for the deeds, books, papers, and writings of and belonging to the ſuitors of the ſaid Court, delivered or to be delivered to the ſaid maſters, and the records, proceedings, deeds, books, papers, and writings, delivered or to be delivered and left in the cuſtody of the ſaid ſecretaries of bankrupts and lunatics reſpectively, together with a public office for the ſuitors of the ſaid Court, were built on the ſame piece of ground, and made fit for the reception of the ſaid maſters and

ſecretaries,

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ſecretaries, and the tranſaction of their reſpective buſineſs therein, and for that purpoſe were furniſhed out of the ſame money with divers deſks, writing tables, ſtools, chairs, and preſſes, fit and neceſſary for the tranſaction of ſuch buſineſs, and for the cuſtody and preſervation of the ſaid records, proceedings, deeds, books, papers, and writings. In the baſement ſtory of the ſaid buildings, under the public office and door-way thereof there are three ſmall rooms, which, until the 21ſt of *December* 1799 were occupied and inhabited by a man, (who had a wife and family reſiding alſo with him,) employed to watch and take care of the ſaid building, and of the repoſitories of the deeds, papers, and writings therein belonging to the public ſuitors of the Court of *Chancery*, and paid a ſalary for ſuch care and trouble by the ſaid maſters in ordinary, but from the day and year laſt aforeſaid the ſaid perſon and his family wholly ceaſed to inhabit the ſaid rooms, and the ſame have been ever ſince wholly unoccupied. The ſaid offices and repoſitories form altogether but one building under one roof, and with one public and general entrance and ſtair-caſe, and from the time of building thereof the ſame have been uſed for the purpoſes in the ſaid act mentioned, and for no other purpoſes; and the ſaid building, and alſo the ground whereon the ſame was erected, and alſo the deſks, writing-tables, ſtools, chairs, and preſſes, (except the wooden chair in the declaration mentioned, which was the property of the Plaintiff,) are veſted in the King for the uſes aforeſaid, and the King is the owner and proprietor thereof. The front of the ſaid building, abutting on the ſtreet called *Southampton-Buildings*, is erected upon ground whereon two meſſuages, with their appurtenances, formerly ſtood, which meſſuages, with their appurtenances at the time when they were taken down were, and for ſome time had been rated under the act of Parliament hereafter mentioned at 3 *l.* 8 *s.* 9 *d.* The Plaintiff after the time of making the rate hereinafter mentioned, and thenceforth until and at the time when, &c. was one of the maſters in ordinary in *Chancery* duly appointed, and as ſuch, like the other maſters, tranſacted the buſineſs of his office in one ſeparate and diſtinct ſet of offices, conſiſting of three rooms in the ſaid building, whereof one was uſed by himſelf, another by his ſenior clerk, and the third by the clerks or writers under ſuch ſenior clerk. The Plaintiff did not, nor did his clerk or writers, at any time occupy the ſaid offices, or dwell or inhabit therein otherwiſe than as hereinafter mentioned, that is

to ſay, that the Plaintiff did with his clerks and writers attend at his ſaid office during the uſual office hours, for the purpoſe of tranſacting the public buſineſs of his ſaid office and for no other, and that the ſuitors of the ſaid Court with their counſel and ſolicitors, had always during thoſe hours free acceſs to the ſaid office, for the purpoſe of proſecuting and defending there their ſuits and cauſes pending in the ſaid court of Chancery, and that the Plaintiff, and the other maſters did in turn attend at the ſaid public office in the day-time during the uſual office hours, for the purpoſe of tranſacting there the public buſineſs of the ſaid Court, by adminiſtering oaths and taking acknowledgments of deeds relating to cauſes pending in the ſame Court, according to the courſe and practice of the ſame Court, and for no other purpoſe, and that on the expiration of ſuch office hours the Plaintiff and his clerk and writers left the ſaid ſeparate offices and public office, and locked up the ſame, and did not return thither until the return of ſuch office hours as aforeſaid, and the Plaintiff and his clerk and writers reſpectively have always had their ſeveral dwelling-houſes or places where they and their families have reſpectively inhabited apart and at a diſtance from the ſaid building, and neither the Plaintiff nor his clerk or writers, nor any perſon whatſoever, at the time of making the ſaid rate, or from thence until or at the time when, *&c.* ſlept in the ſaid offices or building, or in any manner inhabited, held, occupied and enjoyed the ſame or any part thereof, except in the execution of his ſaid office, and according to the direction of the ſaid act, and no other perſon had occupied any part of the ſaid building except at the time and in the manner herein before mentioned. The ſaid building, and all the ſeveral offices and repoſitories therein have always been repaired and inſured againſt fire by order of the Court of *Chancery*, out of the money in the ſaid act mentioned, according to the directions of the ſaid act. On the ſecond *Thurſday* in *June* 1798, and before the time when, *&c.* the committee for the pariſh of *St. Andrew Holborn* above the bars, and the pariſh of *St. George* the Martyr, duly choſen according to the 11 *Geo.* 3. *c.* 22. made a rate upon all perſons inhabiting, holding, uſing, occupying, poſſeſſing, or enjoying any land, ground, houſe, ſhop, wharf, warehouſe, coach-houſe, ſtable, cellar, vault, building, tenement, or hereditament whatſoever, within *St. Andrew Holborn* above the bars and *St. George* the Martyr, (except ſuch ſquares, ſtreets, lanes, and places as had been paved under and by virtue of a certain optional clauſe

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in the ſame act mentioned,) for the neceſſary purpoſes of that act, and the other acts in that act mentioned, the ſaid rate not being for new paving, and not exceeding one ſhilling in the pound in the ſame year, according to the proportion of the yearly rent or value directed by the ſaid act; and alſo another rate for other purpoſes of the act upon all perſons before mentioned, within ſuch parts of the limits aforeſaid as upon the day and year laſt aforeſaid were paved by virtue of certain acts made in the 2d, 3d, 4th, 5th, and 6th years of the king, for empowering commiſſioners to pave, cleanſe, and light the ſquares, ſtreets, lanes, and other places within the city and liberty of *Weſtminſter*, and other places in the ſaid act mentioned, not exceeding ſixpence in the pound in the ſame year, according to the proportion aforeſaid; and in and by the ſaid two ſeveral rates did rate and aſſeſs the Plaintiff as an inhabitant and occupier of one ſeparate ſet of offices in the ſaid building, and for and in reſpect thereof in the ſum of 3 *l.* 2 *s.* 6 *d.* for the purpoſes laſt aforeſaid. Of theſe rates and aſſeſſments due notice was given to the Plaintiff, and the ſum of 3 *l.* 2 *s.* 6 *d.* legally demanded: payment of which being refuſed, the Defendant by virtue of a warrant of two magiſtrates, diſtrained the chair mentioned in the declaration then found and being in the ſeparate and diſtinct ſet of offices occupied by the Plaintiff in the ſaid building as aforeſaid.

Heywood Serjt. for the Plaintiff. One fact ſtated in the ſpecial verdict may be laid out of the conſideration of the Court, namely, that the buildings in queſtion were erected upon the ſcite of two houſes formerly rated. For it has been clearly ſettled by the caſes of *Rex* v. *St. Luke's*, 2 *Burr.* 1053. *Rex* v. *St. Bartholomew's*, 4 *Burr.* 2435. *Rex* v. *Waldo*, *Cald.* 358. and Lord *Amherſt* v. Lord *Somers*, 2 *T. R.* 372. that the rateability of property depends upon the manner in which it is uſed, and that if no perſon can be found to anſwer the deſcription of the act impoſing the rate the property cannot be rated: in the former of thoſe caſes Lord *Mansfield* ſays, "As to the argument that a proprietor of lands or houſes cannot by his own voluntary act diſcharge ſuch his property from payments legally due to other perſons upon and out of it, it does not hold true in fact; for this rate payable to the pariſh, as well as ſeveral other payments ariſing from property and chargeable upon it, do and muſt depend upon the will of the proprietor. The owner of a houſe may, if he pleaſe, pull it quite down, and convert it into a toft." The main queſtion is, whether the buildings which have been rated are to be conſidered as public buildings?

For

For if these be public buildings the Plaintiff is not rateable, it having been provided by the 11 *Geo.* 3. *c.* 22. *s.* 38. that all assessments in respect of public buildings shall be made upon the proprietor, not on the inhabitant or occupier. In this case it is found that the king is the proprietor. It is not necessary to argue whether the King be rateable or not, for if the Plaintiff be not it is sufficient for this case. But independent of the general rule that the King cannot be charged unless personally named, it is clear from the clause of distress, *s.* 39. which authorizes the collectors to levy on the goods of the parties, whether found upon the premises or elsewhere, that the provisions of the act could not have been intended to apply to the King. Nor is there any hardship in this; for by *s.* 17. it is provided that the commissioners shall not be bound to pave in front of any building belonging to his Majesty. When it is considered that these buildings have been erected out of a public fund, and appropriated solely to public purposes, it can hardly be contended that they are not public buildings. Nor will it make any difference that a part of the building is denominated the public office, and used for the general business of all the suitors, whereas the apartments in question are appropriated to the use of the plaintiff only. For business transacted by the Plaintiff in those apartments is public business only relating to the suitors of the court. If indeed he had used them for his private convenience, and had derived a beneficial occupation from them, he would have been liable. This distinction is recognized in many cases which have arisen upon the poor laws. *Rex* v. *Matthews*, *Cald.* 1. *Robson* v. *Hyde*, *Cald.* 310. *Rex* v. *Eyles*, *Const's Bott*, 169. *Lord Bute* v. *Grindall*, 1 *T. R.* 338. *Rex* v. *Hurdis*, 3 *T. R.* 497. *Rex* v. *Woodward*, 5 *T. R.* 79. *Rex* v. *Catt*, 6 *T. R.* 332. And though it be stated that a person was employed to watch and take care of the building, yet that will not alter the case if he were only employed for the purpose of carrying the object of the establishment into effect. This appears from the case of *Rex* v. *Field*, 5 *T. R.* 587. where it was held that a woman who occupied apartments in the buildings of the Philanthropic Society, for the purpose of superintending the children, was not rateable in respect of those buildings. The present question is decided by the case of *Eckersall* v. *Briggs*, 4 *T. R.* 6. which arose upon another paving act, 10 *Geo.* 3. *c.* 23. and where Lord *Kenyon* says, "The question then is, what is meant by public buildings? and that may be answered by saying, that those are public which are applied to pub-

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lic purpoſes." With reſpect to a caſe which may be relied upon, where the preſent Plaintiff was aſſeſſed to the duties on inhabited houſes, for chambers rented by him in *Symond*'s Inn, for the purpoſes of carrying on the buſineſs of his office, and that rate was confirmed by the Judges, it may be obſerved, that where a perſon rents chambers for the purpoſe of doing his public duty, inſtead of doing it at his own houſe, he does ſo for his own convenience: which differs materially from tranſacting buſineſs in a place appointed for that purpoſe by the public. Another caſe will probably be urged as an authority, where a rate upon theſe very apartments, together with the public office, was confirmed by the Judges. As to which it may be ſufficient to ſay, that deciſions of this ſort being made without argument, cannot be put in oppoſition to the determinations of the ordinary Courts.

Praed Serjt. for the Defendant. The argument on the other ſide tends to ſhew that the property in queſtion is not liable to be rated at all. But it appears to have been the manifeſt intention of the act, that all property ſhould be rated in ſome hands or other. And Mr. J. *Aſhhurſt* in *Eckerſall* v. *Briggs*, ſpeaking of a ſimilar caſe, ſays, "It clearly was the intention of the Legiſlature, when this act of Parliament was framed, that no real property within this diſtrict ſhould be exempt from the rates impoſed by it. The property muſt be charged to ſome perſon or other." In the diſcuſſion of this caſe the authorities upon the poor laws may be laid aſide. For in all thoſe caſes the queſtions turned upon the ſufficiency of the occupation of the party rated. But here the queſtion is, whether the Plaintiff do not fall within ſome of the words of this particular act of Parliament, which are, "Perſons who do or ſhall inhabit, hold, uſe, occupy, poſſeſs, or enjoy any land," &c. The act itſelf appears to have made a diſtinction between the apartments appropriated to each maſter and the public office of the ſuitors; the latter being expreſsly denominated *public*, which the former are not: a circumſtance which cannot be conſidered immaterial in an act of Parliament, in which the diſtinction between private and public buildings was contemplated and expreſsly provided for. Although no deciſions upon this particular act are to be found in the courts of *Weſtminſter-Hall*, there are two caſes which have been decided before the Judges, which muſt be conſidered as high judicial authorities upon the ſubject. The preſent Plaintiff, in the year 1779, having been aſſeſſed to the inhabited houſe tax for chambers rented by him in *Symond's*

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Inn, for the purpoſe of tranſacting the buſineſs of his office, the aſſeſſment was confirmed by the Judges (a). Now it is found in the preſent caſe that the Plaintiff kept the key of the apartments: he might have uſed them as he thought proper; and even if they are to be conſidered as public buildings there was a private occupation. They were in all reſpects uſed as the chambers in *Symmond's Inn*; and if the former were rateable as an inhabited houſe, theſe apartments muſt alſo be conſidered as having been inhabited by the Plaintiff. The other caſe (a) aroſe upon this very act of Parliament, reſpecting theſe very apartments, together with the others in the ſame buildings, and is therefore to be conſidered as an expreſs authority upon the point. The reſult of the inquiries which the Court deſired to be made is, that the Six Clerks', Regiſter's,

(a) At a Meeting of the Commiſſioners of the Land Tax, acting for the liberty of the Rolls, in the county of *Middleſex*, at the Six Clerks Hall in *Chancery-lane*, on 5th *February* 1779.

Peter Holford Eſq. one of the Maſters in the High Court of Chancery, rents chambers in a place called *Symond's Inn* in *Chancery-lane*, merely for the purpoſe of carrying on the buſineſs of his office, for depoſiting the deeds and writings left with him; and no perſon lodges or victuals in ſuch chambers, nor are the ſame uſed for any other purpoſe than as aforeſaid; and therefore the ſaid Mr. *Holford* does not apprehend the ſame to come within the meaning of the act of parliament for granting to "His Majeſty certain duties upon all inha- "bited houſes within the kingdom of *Great* "*Britain*." We are of opinion the ſaid chambers ought not to be aſſeſſed to the houſe tax, and have allowed the appeal.

Mr. *R. Golden*, the Surveyor for the Crown, being preſent and diſſatisfied with our determination, requeſted the caſe to be ſtated ſpecially, which we have hereby done, and humbly ſubmit the ſame for your Lordſhips' opinion thereon. Given under our hands the day and year above written.

N. Mitford.
Chriſtian Zouche.
John Dickens.
Benjamin Greene.
S. M. Leake.

19th *Nov.* 1779. We are of opinion that the determination of the Commiſſioners is wrong.

J. SKYNNER.
H. GOULD.
E. WILLES.
W. BLACKSTONE.
W. H. ASHHURST.
G. NARES.
JA. EYRE.
B. HOTHAM.
R. PERRYN.

(a) At a meeting of the commiſſioners for hearing and determining appeals againſt the duties on windows and inhabited houſes, held at the *White Hart* Tavern in *Holborn*, on the 28th day of *March* 1797, *Mr. Carr* on behalf of the Maſters in Chancery appealed againſt the aſſeſſments made on the window and houſe duty for certain offices in a building lately erected in *Southampton Buildings*, *Chancery lane*, in reſpect of which duties the offices made uſe of by each of the Maſters had been made the ſubject of ſeparate and diſtinct aſſeſſments; and they had accordingly been called on for payment of the duties aſſeſſed on their different offices, beſides which the Maſters had been called on jointly for payment of the duties aſſeſſed on other parts of the buildings, conſiſting of the Public Offices, the Public Sale Room, the Porter's Apartment, and the general ſtone-caſe. The ſaid Mr.

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ter's, and Accountant General's offices are rated by the pound rate upon the occupiers; though by agreement the Benchers of *Lincoln's-Inn* pay the amount. The Ordnance office, two Secretaries

Carr alleged that the buildings in queſtion were erected in purſuance of an act of parliament paſſed in the 32d year of his preſent Majeſty's reign, intitled "An act to improve the High Court of Chancery, to "lay out a further ſum of the ſuitors' money upon proper ſecurities, and for applying the intereſt towards diſcharging "the expences of the office of the Accountant-General and for building offices for "the Maſters in ordinary in Chancery, and "a public office for the ſuitors of the ſaid "Court, and offices for the ſecretaries of "bankrupts and lunatics, and building "repoſitories for ſecuring the title-deeds "of the ſuitors of the ſaid Court, the records and proceedings of the Commiſſioners of Bankrupts and Lunatics;" and that ſuch buildings were made uſe of by the Maſters for the purpoſe of tranſacting the buſineſs peculiar to their offices, but that the ſame were not inhabited or uſed except at office hours, except by a porter who had a ſeparate apartment in the ſame building to take care of the ſame, where it was admitted that the porter with his wife and family ate, drank, and ſlept, and conſequently reſided and was paid by the ſaid Maſters proportionably. The ſaid Mr. *Carr* further alleged that by the 4th ſection of the ſaid act the ſaid buildings were declared to be veſted in his Majeſty, his heirs and ſucceſſors, and therefore he contended, on the part of the Maſters, that the ſaid buildings were not liable to be rated to the houſe and window duty.

Mr. *Golden* the Surveyor, on the part of the Crown, contended, that the buildings ought to be conſidered as ſo many different apartments inhabited and uſed by the different Maſters in Chancery, and that it had been admitted that a porter with his wife and family conſtantly reſided in the ſaid buildings, having a ſeparate apartment therein, in which they ate, drank, and ſlept, and that he has the charge of the whole building, and is paid by the ſaid Maſters proportionably. That with reſpect to the act of parliament which veſted the buildings in his Majeſty, the Surveyor contended, that circumſtance did not exempt the Maſters from taxation, becauſe the exemptions under the ſeveral acts of parliament in favour of the King and Royal Family are confined to palaces and houſes in which his Majeſty and the Royal Family actually reſide.

We the Commiſſioners, whoſe names are hereunto ſubſcribed, being preſent, and having heard and conſidered what was alleged on the part of the Crown, as well as on the part of the Maſters in Chancery, have thought fit to allow the aſſeſſment and diſallow the appeal. With which determination Mr. *Carr*, on the part of the Maſters, being diſſatisfied, hath required a caſe to be ſtated by us for the opinion of one or more of the Judges of the Court of King's Bench or Common Pleas, or the Barons of the Court of Exchequer; which we have hereby done accordingly. Witneſs our hands this day.

Thos. Collins.
W. Blamire.
W. Blaſſon.

Holborn Diviſion, 8th *June* 1798.

This caſe having been referred back to the Commiſſioners (by order of the Judges) for them to ſtate whether the perſon who has the care of the building is to be conſidered as a porter or watchman? and they having examined *Francis Norman* (the ſaid perſon in queſtion) upon oath, hereby ſtate the reſult of the ſaid examination, which they ſubmit accordingly for the opinion of the Judges as aforeſaid.

He depoſes, that his buſineſs is to take care of the building, to trim and light the lamps, to ſweep and clean the paſſages, ſtair caſe, ſale-room, the public office, and the Maſters' ſitting room; that the Maſters have laundreſſes whom they employ and pay to keep their reſpective offices clean; that he, his wife, and family, eat, drink, and ſleep in an apartment of the ſaid building; that he does not ſit up to watch, but after ſeeing that the doors are properly faſtened

taries of State's offices and the Transport office, are rated in the same manner, having been paved under the 11 *Geo.* 3. *c.* 22. The Treasury, Horse-Guards, Admiralty, White-Hall, and Signet, being situated in Broadway, which was paved at the expence of Government, are not rated. *Buckingham-House*, which is settled on the queen, is rated. The offices in *Somerset-House* (the site of an old palace) pay to the inhabited house tax, but the area having been paved by Government, they are not rated to the paving rate. *Cur. adv. vult.*

On this day the opinion of the Court was delivered by

Lord ALVANLEY Ch. J. The single question in this case is, Whether this rate has been duly imposed according to the provisions of 11 *Geo.* 3. *c.* 22.? The material words on which this question arises are these, that the Commissioners "shall make one or more rate or rates, assessment or assessments upon all and every person and persons who do or shall inhabit, hold, use, occupy, possess or enjoy any land, ground, house, shop, wharf, warehouse, coach-house, stable, cellar, vault, building, tenement, or hereditament whatsoever, which assessment is to be made by a pound rate." This therefore is a general assessment upon all persons who shall inhabit, hold, use, occupy, possess or enjoy any land or ground of any description whatsoever, and if this clause had stood alone the case would clearly have depended upon the same sort of question which has often arisen on the poor rates, Whether the Masters in Chancery were to be considered as inhabitants or occupiers? But as it was intended that all property however occupied should be rated for the paving, the Legislature has provided in what manner certain buildings should be rated, reciting that "forasmuch as it is reasonable that all public buildings, dead walls, and void spaces of ground, should be rated and assessed for the purposes of the act," it enacts that the Commissioners may "rate and assess all parish churches, church yards, chapels, meeting houses, schools, inns of court and chancery, halls, societies, markets, warehouses, wharfs, void spaces of ground, and all other spaces of ground whatsoever,

fastened and that every thing is safe, he goes to bed. For these services he is paid forty guineas a-year out of the general fund belonging to the Maste

W. Hawkesworth
P. Calde

19th *June* 1798. We are of opinion that the determination of the Commissioners i right.

JAS. EYRE.
AR. MACDONALD
B. HOLNAM.
A. THOMPSON.
G. ROOKE.

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at a rate not exceeding 6*d.* in any one year for every ſquare yard of pavement:" which rate is directed to be paid in reſpect of churches and chapels and church yards, by the church or chapel wardens; and upon the other property, by the owners and proprietors thereof. The firſt of theſe clauſes therefore charges the occupiers of the lands therein mentioned at a pound rate, and the ſecond charges the proprietors of public buildings by the ſquare yard of paving. The only difference between this and the *Mary le Bone* act, which paſſed in the year preceding and on which the caſe of *Eckerſall* v. *Briggs* aroſe, is, that in that act where the yearly income of public buildings could be aſcertained they were to be rated by a pound rate; whereas in this caſe, all public buildings are to be aſſeſſed by the ſquare yard of pavement. With reſpect however to the diſtinction between public and private buildings, there can be but one conſtruction of both acts; and Lord *Kenyon* in the caſe of *Eckerſall* v. *Briggs* thought the line of diſtinction very plain, *viz.* that where a building is applied to public purpoſes, it is a public building. The queſtion therefore will be, Whether according to the true conſtruction of the act, theſe apartments for which the Maſters have been rated are to be deemed public buildings? Theſe apartments are ſituated in a building which was erected by virtue of an act of parliament paſſed in the thirty-ſecond year of the King; which directed that a ſum of money belonging to the ſuitors of the Court of Chancery ſhould be laid out in Government ſecurities and the intereſt of the money applied under the order of the Lord Chancellor towards building and completing proper and convenient offices for the Maſters in Chancery and their clerks, and the ſecretaries of bankrupts and lunatics and their clerks, and ſafe and ſecure repoſitories for the deeds, books, papers and writings belonging to the ſuitors of the Court, and delivered to the Maſters in Chancery, and the records, proceedings, &c. delivered to the ſecretaries of bankrupts and lunatics, together with a public office for the ſuitors of the Court of Chancery in the ſtead or place of the then public office for the reception of the ſaid Maſters and ſecretaries and the tranſaction of their reſpective buſineſs therein: and the act further provides that the ground and buildings thereon ſhall be veſted in his Majeſty, his heirs and ſucceſſors, for the purpoſes of the act. The ſpecial verdict ſtates that in purſuance of this act a building with proper offices has been erected for the reception of the Maſters and the tranſaction of their reſpective buſineſs therein, and that

they have hitherto been uſed for the purpoſes of the act and for no other purpoſes whatever. It is indeed ſtated that up to a certain period a perſon, employed to watch and take care of the building and papers and who was paid by the Maſters, lodged in three ſmall rooms in the baſement ſtory. It was certainly very proper that ſuch a perſon ſhould be ſo employed, and I cannot think that this circumſtance can make any difference in the caſe: and I hope that the Maſters in Chancery will not be afraid to take him back again, though poſſibly it may be ſafer that he ſhould not bring his wife and family with him. If then theſe apartments are to be conſidered as public buildings the rate has been improperly made, ſince it has been made by a pound rate on the occupiers; whereas it ſhould have been made, if at all, on the owner and by the ſquare yard. In the preſent caſe however the owner is the King: and if it were neceſſary to ſhew that the King is not rateable in a caſe where he is not expreſsly named, I might refer to a clauſe in the paving act (*a*) which exempts buildings belonging to his Majeſty from the juriſdiction of the Commiſſioners. But it has been argued that although this may have been erected as a public building, and veſted in the King, yet that there are many caſes in which property belonging to the King when occupied by a ſubject has been held rateable: and I readily admit that if it could have been ſhewn that theſe apartments had been perverted to any private uſe, or that any beneficial occupation or enjoyment had been derived from them, they would have fallen within the caſes which have been decided upon the poor rates in this reſpect, and would have been rateable. My Brother *Praed* felt how much the deciſions upon the poor rates preſſed upon him; and therefore endeavoured to lay them altogether out of the caſe: but they appear to me, to bear ſtrongly upon the ſubject. The words of the ſtatute of *Elizabeth* are "inhabitant and occupier." The caſes therefore upon the poor rates are authorities to ſhew that perſons who are only employed in the buſineſs of their public ſtations, are not within the meaning of the Legiſlature "inhabitants and occupiers." In the caſe of The King v. *St. Luke's*, 2 *Burr.* 1063. it was urged in argument that the ground upon which the hoſpital was built had been formerly covered with buildings which had been very productive

(*a*) 11 *Geo.* 3. *c.* 22. *ſ.* 17.

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to the poor rate, and that it was unjuſt that the hoſpital which was built upon the ſame ground ſhould be exempted: but Lord *Manſfield* anſwered that the rateability of property muſt depend upon the uſe to which the owner thinks proper to apply it, and that as no occupier of the building within the meaning of the act was to be found, the building could not be rated. The ſame rule prevailed in The King v. *St. Bartholomew's*, and The King v. *Waldo*; for the occupiers made no profit of the buildings: and yet in the latter caſe, there was a woman reſident in the houſe who made it as much her private habitation as the porter in the preſent caſe; except indeed that ſhe had no family. So in The King v. *Woodward*, the truſtees of a meeting houſe who made no profit of it were holden not to be rateable; though in *Robſon* v. *Hyde*, the owner of a chapel who made a profit of the pews was holden rateable. Upon the ſame principle in The King v. *Hurdis*, a maſter gunner who occupied a battery houſe at *Seaford* belonging to the Crown was held rateable becauſe he occupied it as his domeſtic houſe for his own convenience: and the ſame rule was applied to the caſes of the Duke of *Portland* (*a*), and of Lord *Bute* (*b*); the former having been the grantee of the ſcite of a royal palace, and the latter ranger of a royal park. In Lord *Amherſt* v. Lord *Somers*, where ſtables were occupied by a regiment of which Lord *Amherſt* was Colonel, he was holden not to be rateable: but it was ſtated in the caſe that his own horſes did not ſtand there, in order to ſhew that he had no beneficial occupation. In The King v. *Suſannah Field*, the Court ſaid that the woman who lived in the buildings belonging to the Philanthropic Society for the purpoſe of ſuperintending the children, was not rateable in reſpect of thoſe buildings: and Lord *Kenyon* compared her ſituation to that of a coachman ſleeping over the ſtables of his maſter. And on the other hand, in The King v. *Catt*, the maſter of a charity ſchool who reſided in the ſchool houſe was thought to be rateable, becauſe he uſed the houſe for his own domeſtic convenience. If therefore according to theſe authorities a perſon inhabiting a public building, but not occupying it for his own domeſtic convenience, is not to be conſidered as an occupier within the meaning of the ſtatute of *Elizabeth*, neither can he be conſidered as an occupier within the meaning of the paving act. Beſides theſe authorities upon the poor rates, there is a caſe which aroſe upon a

(*a*) *Duke of Portland's caſe*, 1 *Conſt's Bott.* 522. ed. 4.

(*b*) *Lord Bute* v. *Grindall*, 1 *T. R.* 338. 2 *H. Bl.* 265.

paving

paving act, and to which I cannot find an anſwer. This is the caſe of *Eckerſall* v. *Briggs*, in which it was contended that Lord *Lothian* was rateable as the occupier of certain ſtables rented by him as Colonel for the uſe of a troop of horſe: but the Court was of opinion that as he occupied them for public purpoſes, the rate ought not to be made upon him but upon the owner; the act having made the owner of public buildings rateable in the ſame manner as the preſent, with this immaterial difference only that according to that act if the rent could be aſcertained the rate was to be impoſed upon the owner by a pound rate, whereas according to the preſent the owner is in all caſes to be aſſeſſed by the ſquare yard of paving. Lord *Kenyon* in that caſe ſays, "The queſtion is what is meant by public buildings? And that may be anſwered by ſaying, that thoſe are public which are applied to public purpoſes." On theſe authorities the Court has been of opinion that ſuch an occupation as is ſtated in this ſpecial verdict is an occupation for public purpoſes, and that the apartments in queſtion are to be conſidered as public buildings within the meaning of the act. It is ſaid however that unleſs the Maſters be rated, there will be no one upon whom the rate can be made, the King being the owner: but that circumſtance cannot vary the queſtion reſpecting the occupation of the Maſters: and the opinion of Lord *Mansfield* in The King v. *St. Luke's Hoſpital*, ſhews that if no perſon can be found to anſwer the deſcription in the ſtatute, no rate can be made. In addition to this objection great reliance has been placed on a determination of the Judges upon an appeal by the Maſters againſt an aſſeſſment under another act of Parliament. But although this determination be certainly entitled to great attention, yet caſes of this deſcription never can be conſidered of equal weight and authority with the deciſions which are made by the Judges when ſitting in their ordinary tribunals; where arguments on both ſides are fully heard, and from which deciſions appeal may be made to the ſuperior courts. From the great number of caſes upon taxes which are brought before the Judges, their determinations are neceſſarily made in a greater haſte, and with ſomething leſs ſolemn attention than the caſes which ariſe in their own courts. We cannot therefore think this determination entitled to ſufficient weight to oppoſe the authority of the deciſions of the Court of King's Bench upon poor rates, and the conſtruction which has been put upon a former paving act by this Court in the caſe of *Eckerſall* v. *Briggs*. It will

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not be neceſſary to comment particularly upon the caſe itſelf, eſpecially as it aroſe upon a different act of parliament from that now under conſideration, though ſome obſervations might be ſuggeſted to take away ſomething from the weight of that determination. It appears that the Maſters were aſſeſſed individually for their reſpective apartments, and collectively for the public office. On the appeal, the Judges ſeem at firſt to have entertained ſome doubts; and to have thought that the caſe in a great meaſure turned upon the character and ſituation of the man who lived in the building, and deſired further information upon this ſubject. Upon the caſe being reſtated it appeared, that the buſineſs of this man was to take care of the building, and ſweep it, for which he was paid a ſalary out of the general fund of the Maſters; that his family reſided with him in the baſement ſtory, and that the Maſters had laundreſſes to take care of their reſpective apartments. I can hardly think that theſe circumſtances could make any very material difference in the caſe: and it is difficult to conceive how the reſidence of a porter who had the care of the whole building could make each Maſter rateable for his own apartment. The public have erected a building in which the Maſters are ordered to tranſact their buſineſs: they have no option. Can this ſubject them to be taxed for ſuch a building, as if it were occupied by them for private purpoſes, and according to the value of a building ſo occupied? It is ſaid that the Maſters are at liberty to occupy their reſpective apartments in any manner which may ſuit their own convenience. But the Lord Chancellor has never given them authority ſo to do; nor do I think that he would permit it to be done: and it is ſufficient in this caſe to ſay that the apartments never have been ſo occupied. If theſe apartments be rateable, the Judges' rooms behind *Weſtminſter Hall*, or any apartments which are uſed ſolely for public buſineſs, may be rated. If indeed public apartments be occupied for domeſtic purpoſes, they ſhould be rated: but if nothing but public buſineſs be tranſacted there, they ought not. Yet if a public officer think proper to hire chambers for the purpoſe of tranſacting his buſineſs there rather than at his own houſe, this is for his own convenience, and he ought to be rated for them. And when the Maſters in Chancery hired chambers in *Symmond's Inn* for the purpoſe of tranſacting their public buſineſs there, they were rated. The inquiries which have been made by the deſire of the Court have not proved very ſatisfactory. It is ſaid that the Six Clerks' Office and the Re-

giſter Office are rated by the pound rate, and that the Society of *Lincoln*'s have thought fit to pay that rate. If that be ſo, the Society have certainly paid that rate in their own wrong: for if they were rateable they muſt have been rateable as owners, in which caſe they would not be liable to be aſſeſſed by the pound rate, but by the ſquare yard. With reſpect to the public offices, ſome pay, ſome do not: where the owner lets them to be uſed as public offices he is rated to the paving tax. Thus if a houſe be hired for tranſacting the buſineſs of the Secretary of State, though the houſe be not rateable as a private houſe, the owner remains liable. The only queſtion in the preſent caſe being, whether the apartments in queſtion are to be conſidered as public buildings within the meaning of the act, we are of opinion that as they have only been uſed for public buſineſs, they are to be ſo conſidered, and that therefore judgment ought to be given for the Plaintiff.

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Per Curiam, Judgment for the Plaintiff.

BUCHER and Another *v.* JARRATT. *May* 22d.

TROVER for "a certificate in writing of the regiſtry of a certain ſhip or veſſel called the *Salem*, which ſaid ſhip or veſſel had been regiſtered by the Plaintiffs, according to the ſtatute in that caſe made and provided."

In trover for the certificate of a ſhip's regiſtry, the certificate may be proved by the production of the regiſtry from which it was copied; though no notice has been given to produce the certificate itſelf.

At the trial before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after laſt *Hilary* Term, it appeared that the Defendant having been employed as broker in the ſale of the ſhip *Salem* by the Plaintiffs had got the certificate of regiſtry in queſtion into his hands, and refuſed to deliver it at their deſire to the perſon who had purchaſed of them, ſo as to enable him to obtain a freſh certificate of regiſtry. To prove that ſuch a certificate had been granted, an officer of the cuſtoms was called, who produced the original regiſtry from which the certificate was copied. This evidence was objected to on the part of the Defendant, becauſe no notice had been given to the Defendant to produce the certificate of regiſtry itſelf, without which it was inſiſted that the Plaintiffs could not reſort to any ſecondary evidence of the inſtrument which they ſought to recover. Lord *Alvanley* admitted the evidence, and a verdict was found for the Plaintiffs.

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A rule *nisi* for a new trial was obtained on a former day, on the ground of the evidence having been improperly admitted, and the case of *Cowan* v. *Abrahams*, 1 *Esp. N. P. Cas.* 50. was then cited, where Lord *Kenyon* in an action of trover for a bill of exchange, refused to admit any evidence respecting the bill, notice not having been given to the Defendants to produce the bill itself.

Shepherd Serjt. now shewed cause. The rule adopted by Lord *Kenyon* in *Cowan* v. *Abrahams* does not apply in the present case, for there it was necessary that the bill itself should be produced, in order to see whether any part of it had been paid off, since the damages were to be estimated by the contents of the instrument, whereas here the jury need not inspect the certificate of registry, in order to estimate the damage the plaintiffs have sustained by the detention of the certificate. Besides many bills of exchange of the same purport may be drawn by the same person, whereas there can be but one certificate of registry of the same ship existing at any one period of time, for no new certificate is granted till the old one is brought in. It was only necessary to prove that such a certificate had been granted to the Plaintiffs, and that the Defendant had tortiously converted it to his own use. Is it to be contended that if trover be brought for a valuable book, no evidence can be received of the value of the book unless a notice has been given to produce the book? And yet in the question of damages much may depend upon the edition of the book, which will be better proved by production of the book than by any other means. If the rule adopted in *Cowan* v. *Abrahams* be extended in the way now contended for, no line can be drawn to prevent its being also extended to every case where a specific thing is sought to be recovered in trover.

Best Serjt. *contrà*. "In *Cowan* v. *Abrahams* Lord *Kenyon* observed, that the objection to the evidence offered was founded on a rule of law not to be departed from, namely, that the best evidence the nature of the case admits of is always to be given; that wherever there is written evidence, parol evidence of its contents is not the best evidence, and is therefore inadmissible." So in a case similar to that before Lord *Kenyon*, the same rule was laid down by the late Lord Ch. J. *Eyre*. In the latter case the parties acquiesced in the opinion of the Chief Justice delivered at *Nisi Prius*, but it is observable that in the report of *Cowan* v. *Abrahams* the point is stated to have been moved in the court of *King's Bench*,

and

and the opinion of Lord *Kenyon* to have been confirmed by the other Judges. The argument adduced from the ſuppoſed abſurdity of giving notice to produce a book or other ſpecific thing ſued for in trover, has no weight whatever in this caſe; for there the rule of law that of written inſtruments the beſt evidence muſt be given unleſs where a notice to produce the inſtrument itſelf has failed of ſucceſs, does not apply, books not being written inſtruments. That rule is founded on the fallibility of the human memory, and ſo far is it carried, that in an indictment for ſtealing a written inſtrument it has been ſaid to be neceſſary to give notice to the priſoner to produce the inſtrument before any evidence can be received of its contents. [*The Court* however obſerved that ſuch was certainly not the practice, and intimated that it had been held unneceſſary (*a*); and *Heath* J. ſaid, that in a caſe tried before himſelf at *Worceſter*, a man having been indicted for ſtealing a 5*l.* note from a perſon who did not recollect the tenor of the note, the indictment charged him generally with ſtealing a 5*l.* note, without adding any further deſcription of the note, and the point being reſerved for the opinion of the Judges, they held the indictment ſufficient.]

Lord ALVANLEY Ch. J. Without controverting the rule laid down by Lord *Kenyon*, I think this caſe very diſtinguiſhable from *Cowan* v. *Abrahams*. None of the arguments uſed by his Lordſhip in that caſe apply to the preſent. There the beſt evidence of the contents of the bill of exchange was unqueſtionably to be derived from the production of the bill itſelf. But the production of the certificate of regiſtry could in this caſe have anſwered no purpoſe whatever, the only queſtion being, Whether the Defendant wrongfully detained the certificate from the Plaintiffs or not? It ſeems to me therefore no violation of the rules of evidence to admit proof of the exiſtence of the certificate, in order to charge the Defendant with a tortious converſion of that inſtrument.

HEATH J. There is a material difference between an action of *aſſumpſit* on a promiſe contained in an inſtrument in writing and an action of trover for the inſtrument itſelf. In the former the promiſe muſt be proved as laid, and conſequently can be beſt proved by inſpection of the inſtrument; in the latter the gift

(*a*) In *The King* v. *Dickhs*, 1 *Leach. Cro. Ca.* 330. ed. 3. which was an indictment for ſtealing a bill of exchange, parol evidence of the bill was received, though no notice to produce it had been given either to the priſoner or his attorney.

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of the action is the tort. Undoubtedly if a party unneceſſarily take upon himſelf to deſcribe the inſtrument he muſt prove his deſcription. But that is not the caſe here. In fact the original was produced, and that which the Defendant inſiſts ought to have been produced was only a copy.

ROOKE J. This action is brought to recover from the Defendant the property in a ſpecific thing; and therefore I think the evidence received at the trial was properly received. Where a written inſtrument is to be uſed as a medium of proof by which a claim to a demand ariſing out of the inſtrument is to be ſupported, there I admit the inſtrument itſelf muſt be produced, or notice to produce it muſt have been given to the Defendant before any evidence of its contents can be received. But this being an action of trover for the certificate of regiſtry itſelf, I can ſee no ſound reaſon why evidence ſhould not be admitted of the exiſtence of the certificate in the ſame manner as evidence of a picture or other ſpecific thing is conſtantly admitted where it is ſought to be recovered in the ſame form of action. It is true that if a party take upon himſelf to deſcribe the contents of the inſtrument, he muſt prove it as he deſcribes it. In this caſe it was not poſſible for the Defendant to entertain a doubt what was the thing demanded, there being but one certificate of regiſtry to a ſhip exiſting at any one period. The original regiſtry, which is a kind of duplicate of the certificate, was produced; and the certificate itſelf being in the poſſeſſion of the Defendant, it was in his power to produce it and ſhew that the Plaintiff's evidence reſpecting the certificate was not correct, if that had been the caſe.

CHAMBRE J. There is an eſſential difference, as I conceive, between the mode of proving a very general or a very minute deſcription of a written inſtrument. The rule undoubtedly is, that no evidence can be received of the contents of a written inſtrument but the inſtrument itſelf. But in this caſe the Plaintiffs declared in trover for a written inſtrument deſcribing it generally, and not referring to its contents, of which evidence could not have been received, as no notice had been given to the Defendant to produce the inſtrument itſelf. I think therefore the evidence was properly admitted.

5 Rule diſcharged.

PIGOTT v. THOMPSON. *May* 24th.

A. agreed in writing to pay the rent of certain tolls, which he had hired, "to the treasurer of the Commissioners;" held that no action for the rent could be maintained in the name of the treasurer.

THIS was an action of *assumpsit* tried at the last assizes for *Cambridgeshire* before Mr. Justice *Grose*, when a verdict was found for the Plaintiff with 63 *l.* 7 *s.* 6 *d.* damages, subject to the opinion of the Court on the following case.

"By three acts of Parliament of the 33 *Geo.* 2. the 13 *Geo.* 3. and the 37 *Geo.* 3. certain persons by name, and all persons qualified as the said acts direct, were appointed commissioners for draining certain fen lands in the isle of *Ely* in the county of *Cambridge*, called *Burnt Fen first District*, and by the provisions of the said acts the commissioners are empowered to erect certain toll-gates, and take and receive certain tolls in the said fen lands, and the tolls are vested in the commissioners and their successors. On the 23d *June* 1798 the commissioners let the said tolls to the Defendant for three years, who thereupon signed a certain paper to the following purport:

"*June* 23d 1798. Now to be let the several tolls of *Burnt Fen first District*, with the toll-house.

June 23d 1798. "I do hereby acknowledge to have hired the "above tolls for three years by private contract, at one hundred "and forty-five pounds *per annum*, to be paid to the treasurer of "the commissioners at his house in *Ely*, by twelve equal monthly "payments in each year, the first payment to begin and be made "on the 24th day of *July* next, as witness my hand, *John* "*Thompson*."

The Plaintiff was on the said 23d *June* 1798, and still is treasurer to the said commissioners. The treasurer is the officer of the commissioners appointed under the act of Parliament with an annual salary. The Defendant immediately entered into the receipt of the tolls, and continued to hold and receive the same during the said three years, and during that time paid to the Plaintiff as treasurer several sums on account of the said rent, but the sum of 63 *l.* 7 *s.* 6 *d.* still remains due, to recover which this action is brought. The declaration contains special counts on the agreement of the 23d *June* 1798 and counts for money paid, money lent and advanced, money had and received, and on an account stated."

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The queſtion for the opinion of the Court was, Whether under the circumſtances the Plaintiff was entitled to recover? If he was, the verdict to ſtand, if not, a verdict to be entered for the Defendant.

Williams Serjt. for the Plaintiff. The queſtion is, Whether the treaſurer of the commiſſioners be entitled to maintain this action? which muſt depend upon this, Whether any contract were made with him by the Defendant? The Plaintiff was the agent of the commiſſioners, and the terms of agreement ſigned by the Defendant import, that in conſideration that the commiſſioners had let the tolls to him, he undertook to pay the rent to the Plaintiff, who was their agent. Such a conſideration is ſufficient to ſupport the promiſe; for if *A.* in conſideration of ſomething received from *B.* promiſe to pay to *C.* this is a good *aſſumpſit* to *C.* If there be a conſideration for the *aſſumpſit* it ceaſes to be *nudum pactum*, though that conſideration ariſe from a third perſon. *Gilbert* v. *Ruddeard*, *Dy.* 272. in marg. *Diſborn* v. *Denabie*, 1 *Roll. Ab.* 31. If the perſon to whom the promiſe is made be authoriſed to give a diſcharge it is ſufficient. If, therefore, the Plaintiff be ſufficiently deſcribed in the agreement, he may well maintain this action. Now the caſe ſtates, that at the time when the agreement was entered into, he was treaſurer to the commiſſioners, and that he continued ſo when the action was brought, and though he be not mentioned by any other than his name of office, being deſcribed as treaſurer, yet the rule applies *id certum eſt, quod certum reddi poteſt.* The promiſe was not made to any perſon who might be treaſurer for the time being, for ſuch a promiſe would not be good in law, but perſonally to the Plaintiff by the deſcription of treaſurer, and the law will not intend a promiſe to be bad, if by any inference it can be made good. Thus if a bond be given to *A.*, *B*, *C.*, and *D.*, churchwardens and overſeers of the pariſh of *E.*, and they go out of office, the action on the bond muſt be brought in the names of *A.*, *B.*, *C.*, and *D.*, averring that they were churchwardens and overſeers at the time when the bond was given; for the bond would not be good in law unleſs it were made perſonally to them. Upon the ſame principle if a bond be given to the churchwardens and overſeers of the pariſh of *E.*, as the bond can only be good as a perſonal obligation to thoſe who at the time when the bond was executed filled the offices of churchwardens and overſeers, the law will intend that the bond was given to thoſe perſons,

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persons, and they may maintain the action, averring themselves to be the same persons who filled those offices when the bond was given.

Sellon Serjt. *contrà* was stopped by the Court.

Lord ALVANLEY Ch. J. It is not necessary to discuss whether if *A.* let land to *B.*, in consideration of which the latter promises to pay the rent to *C.*, his executors and administrators, *C.* may maintain an action on that promise (*a*). I have little doubt however that the action might be maintained, and that the consideration would be sufficient; though my brothers seem to think differently upon this point. It appears to me that *C.* would be

(*a*) This very point arose in *Lowther* v. *Kelly*, 8 *Mod.* 115. where the Plaintiff's attorney had made a lease by indenture to the Defendant in his own name, rendering rent to the Plaintiff, whom the Defendant covenanted to pay; but the case appears to have been adjourned after argument without any decision. It is said by *Levinz* J. in *Gilby* v *Copley*, 3 *Lev.* 139. that when a deed is made *inter partes* a stranger shall not take advantage of a covenant made for his benefit, but where it is not made *inter partes* he may, whether the deed be indented or not; for this he cites *Cooker* v. *Child*, *Hil.* 24 and 25 *Car.* 2. *B. R.* which was an action on a charter-party indented in these terms, "this indented charter-party witnesseth, that *Bindley*, master and part-owner of the ship, with the consent of *Cooker*, the other part-owner, hath let the ship to *Child* on such a voyage;" and *Child* covenanted with *Bindley* *necnon* with *Cooker* to pay 300*l.* and it was held that *Cooker* might maintain the action. Lord *Holt* also, in *Salter* v. *Kidgly*, *Carth* 77. held that one party to a deed could not covenant with another who was no party, but a mere stranger to it. So where a bill was sealed in this manner, "received of *A.* to the use of *B.* and *C.* equally to be divided, to be repaid at such a time to the use of *B.* and *C.*," it was resolved that *B.* and *C.* might each sue for 20*l.* *Shaw* v. *Shermood*, *Cro. Eliz.* 729. affirmed in error, *Yelv.* 23. But where a bond was made to *A.* for the benefit of *B.*, it was adjudged the latter could neither sue upon it nor release it, he not being party to the bond. *Offley* v. *Ward*, 2 *Leo.* 235. *Vide etiam* 2 *Inst.* 673. With respect to the right of a third person to sue upon a parol promise made to another for his benefit, there is great contradiction among the older cases, all which are collected 1 *Vin. Abr.* fo. 533. to 537. *Actions of Assumpsit*, (*Z.*). But in *Dutton* v. *Poole*, *Mich.* 29 *Car.* 2. *B. R.* 2 *Lev.* 210. 1 *Vent.* 318. S. C. Sir *T. Ray.* 302. S. C. and Sir *T. Jones*, 102. S. C. the point seems to have been very fully considered and very solemnly decided. There the father of the Plaintiff's wife being seised of a wood, which he intended to sell to raise fortunes for younger children, the Defendant being his heir, in consideration that he would forbear to sell it promised to pay his daughter, the Plaintiff's wife, 1000*l.*, for which the action was brought; and it was held that the Plaintiff might well maintain the action. Which decision was affirmed in the Exchequer-chamber. In that case, indeed, some stress was laid upon the nearness of relationship between the Plaintiff's wife and her father, to whom the promise was made; but another case has since occurred to which that reason does not apply. In *Martyn* v. *Hinde*, *Cowp.* 437. the Plaintiff declared against the Defendant, rector of *A.*, upon an instrument in writing, dated, &c. whereby the Defendant *promised the Plaintiff* to retain him as Curate till, &c. and to allow him 50*l.* *per annum*; the instrument produced in evidence was a certificate *addressed to the Bishop*, whereby the Defendant nominated the Plaintiff his curate, and promised to allow him 50*l.* *per annum*. Upon this evidence the Plaintiff was, after argument, held entitled to recover against the Defendant. So in *Marchington* v. *Vernon*, *ante*, vol. 1. p. 101. *in notis*. *Buller* J. expressly says, "If one person makes a promise to another for the benefit of a third, that third may maintain an action upon it."

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only a truſtee for *A.*, who might for ſome reaſon be deſirous that the money ſhould be paid into the hands of *C.* In caſe of marriage it is often neceſſary to make contracts in this manner, and the perſonal action is given to the truſtee for the benefit of the *feme covert*. But in the preſent caſe the agreement is, that in conſideration that the commiſſioners have let the toils to the Defendant he will pay to their treaſurer. Now it is ſaid that this amounts to a promiſe to pay to the perſon who was the treaſurer at that time; but I am clear that ſuch was not the meaning of the inſtrument, and that if the Defendant had been removed from his office it would have been a payment which would not have availed the Defendant if he had perſiſted to account with the preſent Plaintiff. The manifeſt intention of the agreement was, that the Defendant ſhould pay the money to any perſon whom the commiſſioners ſhould chooſe to make their treaſurer for the time being; but by law a debt is not ſo aſſignable (*a*).

HEATH J. I am of the ſame opinion. It appears to me that the appointment to pay to the treaſurer was meant for the benefit of the commiſſioners, and they alone can ſuſtain the action.

ROOKE J. I think the contract was made with the commiſſioners.

CHAMBRE J. The contract is to pay to the commiſſioners through the medium of their officer.

Judgment for the Defendant.

(*a*) In *Fenner* v. *Mears*, 2 *Bl.* 1269. the aſſignee of a *reſpondentia* bond made to one *Cox*, with an indorſement by the obligor declaring that he would pay it to any aſſignee of *Cox*, was held entitled to recover againſt the obligor of the bond in *aſſumpſit*. But in that caſe the right of action upon the *aſſumpſit* never could accrue to more than one perſon, *viz.* the perſon who ſhould be the aſſignee of *Cox*; whereas the agreement in the principal caſe preſſes to give the ſame right of action to a ſucceſſion of treaſurers.

May 24th.

COOK and Another v. BATCHELLOR.

If defamatory words be ſpoken of two partners reſpecting their trade, they may maintain a joint action for the ſlander, averring ſpecial damage.

THIS was an action on the caſe for defamation brought by two perſons who were co-partners in trade. The declaration after ſtating that the Plaintiffs carried on trade in partnerſhip as woolſtaplers, and as ſuch had conducted themſelves with honeſty and made great profit, alleged that as co-partners they had bought a quantity of wool, to be weighed by themſelves and paid for according to weight, which they weighed fairly, but that the De-

fendant ſpeaking of them in their trade, and of their weighing the ſaid wool ſaid "when the wool was weighed there was a pound weight concealed under the braſs weight;" there were ſeveral counts varying the expreſſions, and the declaration concluded with an averment that ſeveral perſons (naming them) had in conſequence of the ſpeaking the ſaid words refuſed to have any further dealing with the Plaintiffs. To this declaration there was a general demurrer and joinder therein.

Bayley Serjt. in ſupport of the demurrer inſiſted that this action could not be maintained by two perſons jointly. Although it might be ſaid that as it was averred that the ſpecial damage had accrued to them in their trade, they ought to bring the action as co-partners; yet to this it might be anſwered, that as the words were ſpoken of them in their trade, they were actionable in themſelves, and the ſpecial damage need not have been proved.

Sellon Serjt. was proceeding to argue in ſupport of the declaration, but

The Court were of opinion that the action was well brought by the two Plaintiffs, and *Heath* and *Rooke* Js. referred to a ſimilar caſe of *January* and Another *v. Spires*, in which the ſame point was brought before this Court ſome years back, when the action was held to be maintainable.

gment for the Plaintiffs (*a*).

(*a*) With reſpect to ſeveral perſons ſuing or being ſued jointly for ſlander, ſee the note of Mr. Serjt. *Williams* on *Compton v. Lithebye*, 2 *Saund.* 117. *a*.

REX *v.* PERRING and Another, late Sheriff of *London*.

May 24th.

A Rule *niſi* was obtained on a former day for ſetting aſide an attachment which had iſſued againſt the ſheriff of *London* in a cauſe of *Weſton v. Barnard*. The Defendant in the original action having been arreſted in the laſt long vacation, on a writ returnable the firſt return of *Michaelmas* Term, paid into the hands of the ſheriff's officer the ſum of 20*l.* and the coſts. On the 6th of *November* the Plaintiff ruled the ſheriff to return the writ which was complied with: on the 13th *November* he ruled the ſheriff to

A rule for an attachment againſt the ſheriff for not bringing in the body, having been obtained on the 19th of *November*, and the attachment not ſued out and ſerved on the ſheriff until the 9th of *March* following, the Court held the ſheriff diſcharged, and ſet the attachment aſide.

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bring in the body, which rule expired on the 17th, and this not being complied with, a rule was obtained for an attachment upon the 19th, but at the desire of the sheriff's officer the attachment was not then sued out, nor was it sued out and served on the sheriff until the 9th of *March* following.

Shepherd Serjt. in support of the rule now contended that the Plaintiff by delaying to sue out the attachment for so long a time, and by giving credit to the officer had discharged the sheriff. He cited *The King* v. *The Sheriff of Surry*, 7 *T. R.* 452. where the sheriff having returned *cepi corpus* on the 30th of *January*, and the Plaintiff delayed to rule him to bring in the body until *Michaelmas* Term following, when both the bail were insolvent and the Defendant had absconded, it was held that the sheriff was discharged.

Best Serjt. *contrà* urged that the attachment, though in point of form a proceeding against the sheriff, was in fact a proceeding against the officer from whom the sheriff always takes security. That the case cited was distinguishable from this, since the Plaintiff there had neglected to give the sheriff proper notice to bring in the body of the Defendant, whereas in this case the sheriff, after having been regularly ruled for that purpose, had neglected to do his duty. That as the sheriff's officer had omitted to take a bail-bond upon the arrest, the Plaintiff was deprived of any action against the bail, and the sheriff ought to be answerable for the neglect of his officer: and that unless the attachment was suffered to issue against the sheriff the Plaintiff would be without remedy, for no action could be brought against the sureties of the officer except in the name of the sheriff, and no such action could be maintained unless the sheriff were damnified by being obliged to pay the money under the attachment. He therefore proposed that the sheriff should pay the money and bring an action against the sureties of the officer, and that the Plaintiff should indemnify the sheriff against the consequences.

The Court were of opinion that the Plaintiff had discharged the sheriff, and that the attachment therefore must be set aside. At the same time they observed, that if there were any covenant on the part of the sureties, that the officer should account for all monies received, or any other matter of which the Plaintiff could take advantage by suing in the sheriff's name, he ought to be at liberty so to do on giving the sheriff an indemnity.

Accordingly the rule was made absolute on those terms.

ORTON v. KNIGHT.

May 24th.

If the memorial of an annuity deed between *A. B.* and *C.*, after describing the parties to the deed and the contents, ſtate that it was executed by *A* and *C.* in the preſence of *E.* and *F.*, it will be no objection that *B.* alſo executed it in the preſence of the ſame parties. For it is ſufficient if the memorial ſtate all the ſubſcribing witneſſes without ſpecifying what ſignatures they reſpectively atteſted.

If the memorial only ſtate the time at which execution may be ſued out by words of reference to the deed, it is fatal.

THIS was an application to ſet aſide a judgment entered up on a warrant of attorney for ſecuring an annuity.

The memorial ſtated an indenture made between *Thomas Knight* of the firſt part, *Joſeph Ford* of the ſecond part, and *Welles Orton* of the third part, and after ſpecifying the greateſt part of the deed, further ſtated that it contained a declaration and agreement that the judgment to be entered up ſhould be only a collateral ſecurity for the annuity, and that no execution ſhould be iſſued thereon "until default in payment thereof by the time and in the manner therein mentioned." The memorial further ſtated a bond given by *Thomas Knight* as principal, and *Joſeph Ford* as ſurety, and likewiſe a warrant of attorney to confeſs judgment againſt *Thomas Knight* and *Joſeph Ford*; and then proceeded thus: "And which ſaid indenture was executed by the ſaid *Thomas Knight* (omitting the name of *Joſeph Ford*) and *Welles Orton*, in the preſence of *Richard Brewer* of, &c. and *George Hargrave* of, &c. and the ſaid bond and warrant of attorney were alſo ſeverally executed by the ſaid *Thomas Knight* and *Joſeph Ford* reſpectively, in the preſence of the ſaid *Richard Brewer* and *George Hargrave*, who were accordingly the ſubſcribing witneſſes to the execution of the three ſaid ſeveral inſtruments reſpectively." The indenture itſelf contained a proviſo that execution ſhould not be iſſued upon the judgment until 21 days default after the days of payment.

Beſt Serjt. (among other things) objected that although the memorial ſtated the indenture to have been made by three perſons, *viz. Knight*, *Ford*, and *Orton*, yet that it did not ſpecify who the witneſſes were in whoſe preſence *Ford* executed that inſtrument; and he cited *Hart* v. *Lovelace*, 6 *T. R.* 471. where the memorial of an annuity, which ſtated that the ſeveral ſecurities were executed in the preſence of *W. D.* and *W. M.* "or one of them," was held bad for the uncertainty with which the witneſſes were deſcribed.

Shepherd Serjt. *contrà*, inſiſted that it is not neceſſary to ſtate ſpecifically the witneſſes in whoſe preſence each of the parties executed, but that all the information is conveyed which the act requires if the memorial ſtate all the perſons who were ſubſcribing

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witneſſes to the deeds; that no other perſons atteſted the deeds in this caſe but the two perſons who were mentioned in the memorial, and that it would have been quite ſufficient if the memorial had ſtated generally that they were the ſubſcribing witneſſes.

The Court were of opinion that as the names of all the perſons who atteſted the inſtrument were ſpecified, the object of the act had been complied with (*a*).

Beſt then objected that the time at which execution was to be iſſued upon the judgment was not ſufficiently ſtated upon the memorial, the agreement for this purpoſe being only ſtated by words of reference to the deed: for which he cited *Cunningham* v. *Mackenzie*, *ante*, vol. 2. p. 598.

And *The Court* thinking this objection fatal, made the rule abſolute for ſetting aſide the judgment.

(*a*) But it ſeems that when the ſame witneſſes atteſt ſeveral inſtruments, it will not be ſufficient if the memorial only mention their names as witneſſes to one. *Van Braam* v. *Iſaacs*, *ante*, vol. 1. p. 451.

May 26th.

Sir Charles Marsh Knight and Another v. Martindale.

The grantor of an annuity having agreed with the grantee to redeem, drew a bill of exchange for 5000*l.* at three years, which the grantee diſcounted in the following manner; he took 4083*l.* 6*s.* 8*d.* as the amount of the purchaſe-money and arrears, advanced 166*l.* 13*s.* 4*d.* to the grantor in caſh, and took 750*l.* as intereſt for three years upon 5000*l.* —Held that the tranſaction was uſurious.

Debt on bond. The Defendant, after craving oyer of the bond pleaded *non eſt factum*, and ſeveral ſpecial pleas of uſury. The cauſe was tried before Lord *Alvanley* Ch. J. at the *Weſtminſter* Sittings after laſt *Michaelmas* Term, when the jury found a verdict for the Plaintiffs, ſubject to the opinion of the Court upon a ſpecial caſe; at the ſame time declaring that they believed the Plaintiff Sir *Charles Marſh* did not think that he was acting contrary to law.

The material facts of the caſe were as follow:—In *April* 1790 Colonel *Robert Wood* had granted to the Plaintiff Sir *Charles Marſh* and *Henry Deane* (ſince deceaſed) annuities to the amount of 500*l.* in conſideration of 3,500*l.* paid to them by the ſaid *Robert Wood*, which annuities were redeemable on payment of the original conſideration-money, and alſo arrears, coſts, charges, and expences. In *June* 1792, the annuities not being regularly paid, Colonel *Wood* applied to the Plaintiff Sir *Charles Marſh* and the ſaid *Henry Deane* to negotiate a bill in order to redeem the ſaid annuities; and on the 22ſt of *June* 1792 the Plaintiff Sir *Charles*

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Marſh, in conſequence of a letter from the ſaid *Henry Deane*, met Colonel *Wood* at the houſe of *Benjamin Martindale* and *Edward Fitch* in *St. James's-ſtreet*, *Weſtminſter*, when a bill of exchange, which Colonel *Wood* brought with him to the meeting, was produced by him, and Sir *Charles Marſh* agreed to diſcount it, which bill of exchange was as follows:

"Sirs, *London*, *June* 21ſt 1792.

"At three years after date pleaſe to pay Sir *Charles Marſh*, *Henry Deane* Eſq. and Company, or order, the ſum of five thouſand pounds, value received by

Your humble ſervant,

£. 5000. (Signed) *Robert Wood.*

To Meſſrs. *Benjamin Martindale*,
Fitch, and Company. Accepted, M. & F."

The 5000*l.* was made up as follows:

Purchaſe of the annuities - - -	3,500	0	0
Half a year's annuity due - - -	250	0	0
For redeeming the annuity without notice according to the condition of the deed - -	250	0	0
Two months' annuity due - - -	83	6	8
Paid by Sir *Charles Marſh* to Colonel *Wood* in Caſh	116	13	4
	4,250	0	0
For diſcount for three years on 5000*l.*	750	0	0
	5000	0	0

At this meeting of the 21ſt of *June* 1792 Sir *Charles Marſh*, having the bill of exchange, deſired that he might have a bond in the place of it, thinking that a better ſecurity; and accordingly a bond was prepared and given inſtead of the bill of exchange, which, together with the annuity deeds, was delivered up by Sir *Charles Marſh* for the bond. The bond was a joint bond by Colonel *Wood*, *Benjamin Martindale*, and *Edward Fitch*, for 10,000*l.*, conditioned to be void on payment of 5000*l.* on the 21ſt of *June* 1795, "without any intereſt for the ſame, and without any deduction or abatement whatever." Sir *Charles Marſh* had no attorney or ſolicitor or man of the profeſſion preſent on his behalf. In *June* 1795, Colonel *Wood* being then abroad, it was agreed by the Plaintiff to accept the bond mentioned in the declaration (which was a joint and ſeveral bond) from *Benjamin Martindale*,

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Martindale, *Edward Fitch*, and the Defendant *John Martindale*, in lieu of the firſt mentioned bond of the 21ſt of *June* 1792.

The queſtion for the opinion of the Court was, Whether the verdict ought to ſtand? if not, a nonſuit to be entered.

Onſlow Serjt. for the Plaintiffs. In this caſe there was no corrupt agreement within the meaning of the ſtatute of *Anne*, for it was either a common tranſaction of diſcount within the protection of the law, or a purchaſe of an annuity upon terms. 1ſt, The ſum of 750*l.*, which was deducted for diſcount, amounts to no more than legal intereſt upon 5000*l.* for three years; and though it were taken in advance, yet that is the ordinary mode of diſcount practiſed by the Bank of *England*; and if the bill in this caſe had been of a ſhorter date, no doubt could have been entertained upon the ſubject. But the mere length of time cannot make any difference in the caſe, if the agreement was not corrupt and intended as a cover for taking more than 5*l. per cent.*; for many bills in the courſe of trade are drawn both from *India* and *Africa* of a date nearly if not quite as long, and yet the diſcount of ſuch bills has never been deemed uſurious. In the caſe of Sir *B. Hammett* v. *Yea*, *ante*, vol. 1. p. 151. it is ſaid by *Eyre* Ch. J. that "where a party on a contract for a loan intentionally takes more than 5*l. per cent. per annum* for forbearance of that loan he is guilty of uſury, but that whether more than 5*l. per cent.* is intentionally taken upon any contract for ſuch forbearance is a mere queſtion of fact for the conſideration of a jury, and muſt always be collected from the whole of the tranſaction as it paſſes between the parties." Now the jury in the preſent caſe have expreſsly negatived any intention on the part of the Plaintiff to act corruptly; and indeed it appears from the caſe that the note was diſcounted for the accommodation of Colonel *Wood*. 2dly, The tranſaction does not amount either to a loan or forbearance of money, but merely to a purchaſe of an annuity upon terms. Colonel *Wood* might have had a right to redeem the annuity upon payment of a certain ſum in ready money; but as he made no offer of that kind, he muſt be conſidered in the ſame light as any other purchaſer of an annuity, from whom the vendor may require ſuch terms as he thinks proper without incurring the guilt of uſury. In the caſe of *Yeoman* v. *Barſlow*, 1 *Latw.* 271. the Plaintiff declared that in conſideration that he had delivered to the Defendant hammered ſilver money in number and tail to the amount of 300*l.* the Defendant promiſed at the end of eight months to pay 300*l.* in new milled money, together with 4*l.* 10*s.* for intereſt or conſideration for every 100*l.*

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of the old hammered money; and the Court were of opinion that there was no loan, and that without a loan there could be no uſury; and it was ſaid that if a man have great occaſion for guineas, and can make a great advantage of them, and for this purpoſe give another money beyond their value, this is no uſury. So in this caſe, if there was no loan, the tranſaction cannot amount to uſury, though more was given for the annuity than it was really worth.

Bayley Serjt. *contrà.* Although it be lawful upon the diſcount of a bill of exchange to take intereſt upon the whole amount of the bill at the time when the money is advanced, yet that practice muſt be conſidered as an exception to the general rule of law, and muſt be confined to tranſactions upon bills in the ordinary courſe of trade. It has not been found by the jury that this bill, which is for three years, was diſcounted according to the uſage of trade; and it is too much to infer that becauſe bills in the ordinary courſe of trade may lawfully be diſcounted in the manner above ſtated, a bill for any period of time may be diſcounted in the ſame manner; ſince the conſequences of ſuch a doctrine would defeat the proviſions of the ſtatute. Suppoſe a bill for 10,000 *l.* at ten years to be diſcounted in this manner, the intereſt for that period would amount to 5000 *l.* conſequently the lender would advance but 5000 *l.* and at the end of ten years would receive double that ſum; and if the bill, inſtead of being drawn for ten years were drawn for twenty, the intereſt would amount to the whole ſum of 10,000 *l.*, and the lender would have nothing to advance, though he would be entitled to 10,000 *l.* at the end of the time. It is true that the receipt of intereſt before it becomes due without any previous agreement to that effect does not amount to uſury. *Hawk. P. C.* b. 1. c. 82. ſ. 14. ed. 3. But if the agreement be that the lender ſhall deduct the intereſt at the time when the money is advanced, the ſum really forborn is not the whole ſum mentioned in the bill, and therefore it is uſury. *Barnes* v. *Worledge*, *Noy.* 41. *Yelv.* 30. S. C. *Cro. Jac.* 25. S. C. *Moor*, 644. S. C. and *Dalton*'s caſe, *Noy.* 171. 2dly, It is contended that this was a mere re-purchaſe of the annuity upon terms. It is true that Sir *Charles Marſh* was not bound to agree to the redemption of the annuity unleſs ready money were paid, but it appears by the caſe that he did agree to the re-purchaſe; that the terms of redemption amounted to 4,083 *l.* 16 *s.* 8 *d.* and that Sir *Charles Marſh* paid 166 *l.* 13 *s.* 4 *d.* in money, making all together

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the ſum of 4,250 *l.* This is all that was advanced to Colonel *Wood*, and yet intereſt was taken upon 5000 *l.* The ſum of 4250 *l.* became a debt due to Sir *Charles Marſh*, and the taking 750 *l.* for the forbearance of that ſum was uſurious. With reſpect to the intereſt, if a perſon by miſtake receive more than 5 *l. per cent.* it will not amount to uſury; but if he agree to receive more than that rate of intereſt the reſervation will be illegal, and will vitiate the ſecurity, though he may not be aware that he is contravening the ſtatute.

Cur. adv. vult.

The opinion of the Court was this day delivered by

Lord ALVANLEY Ch. J. The queſtion in this caſe ariſes on the validity of the firſt bond; in lieu of which the ſecond bond was given (*a*). It is contended on the part of the Plaintiff, that the tranſaction as it appears upon the caſe, is neither more or leſs than the purchaſe of an annuity, and not in the nature of a loan or ſum taken for the forbearance of money due: and if that could be made out the Plaintiff would be entitled to recover. It is alſo contended, that at all events the negotiation of the bill of exchange was a tranſaction in the uſual mode, in which all perſons poſſeſſed of bills of exchange have been permitted to diſcount them; in which caſes the intereſt is always deducted from the money advanced. It certainly has been determined that ſuch a tranſaction on a bill of exchange in the way of trade, for the accommodation of the party deſirous of raiſing money, is not uſurious, though more than five *per cent.* be taken upon the money actually advanced. In ſuch caſes the additional ſum ſeems to have been conſidered in the nature of a compenſation for the trouble to which the lender is expoſed: and unleſs that indulgence were allowed, it might not be worth while for any merchant to diſcount a bill. If, therefore, nothing more has been done in this caſe than what always has been done by way of accommodation among merchants, the tranſaction was not uſurious: but the rule muſt be confined ſtrictly to that ſort of tranſaction; for if diſcount be taken upon an advance of money without the negotiation of a bill of exchange it will amount to uſury, as appears clearly from the caſes which were cited in the argument. We muſt therefore conſider what

(*a*) The latter bond being a ſubſtitution for the firſt bond, which firſt bond was given by way of ſubſtitution for the bill on which the uſury aroſe, and the whole tranſaction being between the original parties, the latter ſecurities were infected by the infirmities of the former. *Cuthbert* v. *Hayley*, 8 *T. R.* 390. But if the latter ſecurities had been given to an indorſee of the bill without notice of the uſury, it would have been otherwiſe. *Ibid.*

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was the real tranſaction between the parties. I ſtated to the jury that if a man agree to take more than five *per cent.* for the forbearance of money, the law declares that ſuch an agreement is corrupt within the ſtatute of *Anne*, whether the party thought at the time that he were acting contrary to the ſtatute or not. And though the jury have found that Sir *Charles Marſh* did not think that he was acting contrary to law, there is nothing in that finding to prevent us from examining the tranſaction and declaring it to be corrupt if it appear to us to be ſo in point of law, without ſending the caſe back to a jury to find the corruption. It was however contended, that the tranſaction was to all intents a purchaſe of an annuity; and this certainly was the ſtrongeſt ground which the Plaintiff could take, for it has been determined in all the caſes upon the ſubject, that a purchaſe of an annuity, however exorbitant the terms may be, can never amount to uſury. But if the tranſaction reſpecting the annuity be only a cover for the advancement of money by way of loan, it will not exempt the lender from the penalty of the ſtatute, or prevent the ſecurities from being void. Then is this tranſaction the purchaſe of an annuity or is it not? I admit that if the annuity had been irredeemable, the Plaintiff would have had a right to ſay that he would not ſell it under 5000*l.* But here Colonel *Wood* was entitled to redeem the annuity on payment of the ſeveral ſums ſtated in the caſe, amounting to 4083*l.* 6*s.* 8*d.* It was then propoſed that Sir *Charles Marſh* ſhould advance 166*l.* 13*s.* 4*d.* making with the purchaſe money of the annuity 4250*l.*, and that he ſhould diſcount a bill of 5000*l.* at three years. What is this but forbearing for three years to take the ſum of 4250*l.*, for which forbearance he was to receive intereſt on 5000*l.*? The jury were impreſſed with a notion that a bill at three years was ſuch a bill as no reputable man would diſcount; though it was ſaid that ſome *Eaſt India* bills of two years' date had been diſcounted. Indeed Lord Chief Juſtice *Eyre* ſeems to have thought that the length of the date of a bill was ſufficient to afford a preſumption that the diſcount was intended as a cover for a loan. And if we conſider the effect of diſcounting bills at very long dates, the ſtrength of this preſumption will be manifeſt; for if the practice be carried to a great length, the intereſt will annihilate the principal. I think therefore, that the diſcount of ſuch a bill as this, not coupled with the tranſaction reſpecting the annuity, would have been almoſt ſufficient to have afforded a preſumption of

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uſury; but coupled as it is with the redemption of this annuity, it is impoſſible to wink ſo hard as not to ſee what the real tranſaction is. Then why was not the bond given in the firſt inſtance inſtead of the bill of exchange? The reaſon is obvious: the 750*l.* which was taken as intereſt was not then due; but by drawing a bill of exchange at three years for 5000*l.* for the purpoſe of being diſcounted, and adding the intereſt upon that bill to the 4250*l.*, a capital ſum of 5000*l.* to be paid in three years was created, for which ſum the bond could not have been given in the firſt inſtance. Some old caſes have been cited to ſhew the opinion of lawyers upon uſury before the ſtatute of *Anne*. The caſe of *Barnes* v. *Worledge*, *Noy*, 41. variouſly as it is reported in that book, and in *Cro. Jac.* 25. *Yelverton*, 31. and *Moor*, 644. in reſpect of the opinions of the particular Judges, ſeems to ſhew that ſo early as the time of *James* the Firſt, and before the preſent ſtatute of uſury, it was conſidered that if it were agreed that part of the principal ſhould be retained at the time of the loan, or be paid before the expiration of the year, it would be uſury, becauſe the borrower would not have the uſe of the ſum upon which the intereſt was taken for the whole year. And the expreſſion of *Popham* J. in *Dalton*'s caſe, *Noy*, 171. is to the ſame effect. There is alſo a caſe of *Symonds* v. *Cockerill*, *Noy*, 151. which is extremely applicable to the ſecond point of this caſe. There a queſtion having ariſen whether a deed ſecuring a rent charge were void for uſury, the Court agreed that "if the original contract was for to have a rent charge, that is not uſury, but a good bargain and pennyworth; but if the party had come for to borrow the money, and then ſuch a bargain had enſued by ſecurity, then that is uſury." Let us ſee then whether the doctrine laid down in *Barnes* v. *Worledge* and *Dalton*'s caſe has been relaxed by modern deciſions. In *Maſſa* v. *Dauling*, 2 *Str.* 1243. it was contended that a note for 200*l.* at three months, given upon the advance of 197*l.*, and another note for 200*l.* taken at the end of the three months upon the advance of 3*l.* for thoſe three months, was not uſury, it being inſiſted that it was an abſolute purchaſe of the notes: but *Lee* Ch. J. held, and the jury found, that it was not a purchaſe but a loan, and conſequenty uſurious. In *Richards* v. *Brown*, *Cowp.* 770. the tranſaction in form was the purchaſe of an annuity, but it appearing that in ſubſtance it was a loan under colour of an annuity, the Court held it within the ſtatute of uſury. In *Lowe* v. *Waller*,

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Dougl. 740., Lord *Mansfield* says what is very applicable to the present case, "No shift will enable a man to take more than legal interest upon a loan: therefore the only question in all these cases is, What is the real substance of the transaction? not, What is the colour and form? This is one of the strongest cases of the sort I ever knew litigated: it is impossible to wink so hard as not to see that there was no idea between the parties of any thing but a loan of money." It is true that the cases of *Auriol* v. *Thomas*, 2 *T. R.* 52. and Sir *B. Hammett* v. *Yea*, in this Court, have completely established that in the discount of bills a banker may take more than 5 *per cent.* if the excess be only taken to defray the expences of remittance, provided such excess be reasonable, and that it be not a cover for usurious interest. In such cases, therefore, the only question is, Whether it be a real discount in the way of trade, or a mere loan of money? In the present case, no man looking at the circumstances can entertain a doubt that the transaction was not a discount in the way of trade, but was merely employed as the means of obtaining more than legal interest. It only remains for me to notice the case of *Yeoman* v. *Barstow*, *Lutw.* 271. as to which I must say, that I do not quite understand it, nor should I have concurred in the judgment there given, although it proceeds on grounds which seem to be very distinct from the present case. In that case I think it might have been inferred that the transaction was a colour for taking more than legal interest: but the Court thought that it did not necessarily appear that the transaction was usurious, and therefore they gave judgment for the Plaintiff. In this case we are of opinion that sufficient appears to shew that the agreement was corrupt in law, whatever the intention of the Plaintiff may have been. The bill of exchange was given to secure a much larger sum than legal interest on the sum which would be due at the end of three years, and the bond, being given in lieu of that bill, is therefore void.

Per Curiam, Let a nonsuit be entered.

May 31st.

JOSEPH JOHNSON *v.* JOHN JOHNSON.

ASSUMPSIT for money had and received.

The cauſe was tried before *Heath* J. at the *Summer* aſſizes for *Warwick* 1801, and the Plaintiff was nonſuited. In *Michaelmas* Term following, a rule *niſi* for ſetting aſide the nonſuit and having a new trial was obtained; but afterwards, at the deſire of the Court, it was agreed that a ſpecial caſe ſhould be drawn up, the material facts of which were as follow:

William Johnſon of *Rugby*, being poſſeſſed for the remainder of a term of 1900 years of a houſe and little cloſe in *Rugby*, by indenture of the 22d *Auguſt* 1761, in conſideration of an intended marriage (afterwards ſolemnized) between himſelf and *Anne Langley*, aſſigned the above premiſes to *John Walker* and *Joſeph Johnſon*, their executors, adminiſtrators, and aſſigns, in truſt to permit the ſaid *William Johnſon* to enjoy the premiſes for the remainder of the term if he ſhould ſo long live; remainder after his death to his intended wife for her life; and after her deceaſe upon truſt to permit and ſuffer the heirs of the body of the ſaid *Anne Langley* by the ſaid *William Johnſon* lawfully begotten, to receive the rents and profits during the remainder of the term; and in default of ſuch iſſue, to permit the executors, adminiſtrators, and aſſigns of the ſaid *William Johnſon* to receive and take the rents and profits during the remainder of the term. This deed alſo contained a power of revocation to *William Johnſon* and *Anne Langley* during their joint lives. *William Johnſon* by will, dated the 12th *December* 1732, deviſed as follows: "*Item*, I do hereby ratify and confirm the ſettlement of my houſe in *Rugby*, wherein I now live, with the cloſe and appurtenances thereto belonging, made on my marriage with my preſent wife; and ſubject to ſuch uſes as are contained in the ſaid ſettlement, I do give and bequeath all my reverſion, remainder, and intereſt in the ſame premiſes unto *Edward Boddington*, *Thomas Walker*, *Joſeph Johnſon* (the Plaintiff), and *Philip Williams*, and to their executors, adminiſtrators, and aſſigns, in truſt that they and the ſurvivors, &c. ſhall, as ſoon as the uſes in the ſaid ſettlement ſhall be ſpent and executed, or otherwiſe ended and determined,

A. by will deviſed to *B. C. D.* and *E* two parcels of land upon truſt to ſell and divide the money among his brothers' and ſiſters' children. *B. C. D.* and *E.*, the latter, being one of 24 perſons entitled under the will to a ſhare of the money, were proceeding to ſell when it was agreed by the three firſt truſtees and the 23 other perſons entitled to the money that *E.* ſhould become the purchaſer of the two parcels of land, paying 300*l.* for one and 700*l.* for the other. A conveyance was accordingly prepared and executed by *B.* and *C.* only, upon which *E.* took poſſeſſion of the lands, and paid the purchaſe-money, which was divided among the ſeveral perſons entitled under the will. *E.*, being afterwards evicted from the ſmaller parcel in conſequence of a defect in the title derived under the will, brought an action for money had and received againſt one of the 23 perſons to recover the ſhare of the 300*l.* received by him, at the ſame time refuſing to give up the parcel of land for which 700*l.* had been paid. *Held* that he was entitled to recover.

determined, or at such time sooner as they shall think proper, sell and dispose of my said reversion and remainder in the same premises for the best price or prices which can be procured for the same, and shall pay and dispose of the monies arising from such sale unto and amongst all and every of my brothers' and sisters' children which shall be surviving, in equal shares and proportions." And after reciting in his will that about the time of the inclosure of *Rugby* fields he had purchased one yard-land in *Rugby* for the remainder of a term of 3000 years, and that on the late inclosure thereof there was awarded to him in lieu thereof a plot of ground containing 16 acres 3 roods or thereabouts, and that he (*William Johnson*) borrowed some money on bonds towards paying the purchase thereof, he "gave and bequeathed the said plot of ground, with the appurtenances, unto the said *E. W.*, *T. B.*, *J. J.*, and *P. W.*, their executors, administrators, and assigns, for the residue and remainder of the said term, in trust that they should out of the rents and profits, and by mortgage of the said plot of ground, raise the said principal money and interest which should be owing on the said bonds, and pay the same in discharge of the said bonds, and subject to such charge so to be made on the said lands, in trust to permit and suffer the rents and profits of the same plot of ground to be received by his wife *Anne Johnson* until his son *Thomas Johnson* should attain 21; and as soon as he should attain 21, in trust to permit and suffer the rents and profits thereof to be received by him during his life; and after his decease, in case his son should leave any children, in trust for them; but in case he left no child, but left a widow, then in trust that the rents should be paid to her for her life; and after the decease of his son's children and widow, in trust for his (the testator's) wife for life; and after her decease, in trust to sell and dispose of the said plot of land for the best price which could be got for the same, and to pay and dispose of the money arising from such sale unto and amongst all and every of his (the testator's) brothers' and sisters' children which should be then living, in equal shares and proportions." *William Johnson* appointed his wife *Anne Johnson* sole executrix of his will, and died in 1784, without having altered it. In 1788 his widow *Anne Johnson* died, leaving the testator's son, *Thomas Johnson*, her surviving; and in 1791 the said *Thomas Johnson* the son died a bachelor and intestate, aged 26 years. Upon the death of the widow and son of *William Johnson* the testator without issue,

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the truſtees entered into poſſeſſion of the truſt premiſes, and were about to ſell them, when *Joſeph Johnſon* (the Plaintiff), one of the truſtees, and alſo one of the legatees, being deſirous to purchaſe, application was made to his co-truſtees, as alſo to the different legatees (being 23 in number beſides himſelf), to know the terms on which the premiſes were to be ſold; and it was finally agreed by the truſtees and by all the legatees (witneſſed by a memorandum in writing to that effect, and ſigned by them, including the Defendant who was one of the legatees) to ſell the houſe for 300 *l.* and the land for 700 *l.*, each being diſtinctly valued. This ſum the Plaintiff agreed to give, and the following articles were in conſequence prepared: "Be it remembered that it is this day agreed between *Edward Boddington* of, &c. *Philip Williams* of, &c. and *Thomas Walker* of, &c. and *Joſeph Johnſon* of, &c. as follows; to wit, the ſaid *E. B.*, *P. W.*, and *T. W.* do hereby agree that they will, at their expence, on or before *Old Lady-day* next, make out a good title to, and by conveyances and aſſignments, to be prepared at the coſts of the ſaid *Joſeph Johnſon*, grant and aſſign unto the ſaid *Joſeph Johnſon*, his heirs, executors, adminiſtrators, or aſſigns, or as he or they ſhall direct, All that meſſuage or tenement, outbuildings, backſide, and appurtenances to the ſame belonging, ſituate in *Rugby* aforeſaid, now in the occupation of Mr. *W. L.*; and alſo all that allotment of land lying in the fields of *Rugby* aforeſaid, containing 16 acres and three roods or thereabouts, now in the occupation of Mr. *S. D.*, together with all rights, &c. &c.: In conſideration whereof, the ſaid *Joſeph Johnſon* doth agree that he will pay or cauſe to be paid unto the ſaid *E. B.*, *P. W.*, and *T. W.*, at the time above limited, the ſum of 1000 *l.* as and for the purchaſe-money for the ſaid premiſes." Then followed ſome ſtipulations in favour of the purchaſer, but not material to be ſtated; and the articles were ſigned by *Edward Boddington*, *Philip Williams*, *Thomas Walker*, and *Joſeph Johnſon*. In purſuance of the above contract, the title deeds were delivered to the Plaintiff's attorney, by whom an aſſignment of the land was prepared from the mortgagee and the parties intereſted, which was executed by *Edward Boddington* and *Philip Williams*, but not by *Thomas Walker*, the other truſtee, or any other perſon. An indenture of aſſignment of the houſe and premiſes in *Rugby* was alſo prepared, to which the four truſtees were made parties of the firſt part; *Job Walker* and *Lucy* his wife, and *Samuel Walker* and *Elizabeth* his wife, (the ſaid *Lucy* and *Elizabeth* being

surviving acting executrixes of *John Walker* who survived *Joseph Johnson* his co-truſtee in the truſt created by the deed of the 22d of *Auguſt* 1761,) of the ſecond part; and one *J. B.* of the third part; and it was therein witneſſed that the ſaid *Edward Boddington*, *Thomas Walker*, and *Philip Williams*, at the requeſt of *Joſeph Johnſon* (the Plaintiff), and the ſaid *J. W.* and *Lucy* his wife, and *S. W.* and *Elizabeth* his wife, aſſigned to *J. B.* as truſtee for *Joſeph Johnſon* (the Plaintiff) the remainder of the term of 1900 years in the houſe and premiſes in *Rugby*. This deed was executed by *E. B.* and *P. W.* two of the truſtees, but by no other perſon. On the 17th of *April* 1792 a meeting of the legatees was holden, at which the Plaintiff and *Philip Williams* one of the truſtees attended, and the purchaſe-money was then divided among the legatees according to their reſpective ſhares. The Defendant received his ſhare, amounting to 29 *l.*, and ſigned a paper acknowledging his receipt from the four truſtees of his ſhare, and diſcharging them and the eſtate. At the *Lent* aſſizes 1797, at *Warwick*, a Mrs. *Sutton*, who was the aunt and next of kin of the teſtator's ſon *Thomas Johnſon*, recovered from the Plaintiff the houſe and premiſes ſituate in *Rugby* by ejectment, and afterwards obtained a verdict for the meſne profits thereof, amounting to 74*l.* 5*s.* Upon this event taking place, 18 out of the 24 legatees paid back to the Plaintiff their ſeveral proportions of the money received by them on the ſale of the houſe and premiſes to the Plaintiff; but the Defendant and five others refuſing to do the ſame, the preſent action was commenced in order to determine the queſtion. The Plaintiff is ſtill in poſſeſſion of the plot of land in *Rugby* fields (upon which he has expended a conſiderable ſum of money in building, drainage, and other improvements), being part of the premiſes purchaſed for the ſaid ſum of 1000*l.* under the aforeſaid agreement entered into between him and the other truſtees, and receives annually the rents and profits thereof, amounting to 35*l.* 14*s.* to his own uſe; and on application made to him on the part of the Defendant, refuſes to relinquiſh the purchaſe of the plot of land, and to reſell the ſame for the parties intereſted under the teſtator's will.

The queſtion for the opinion of the Court was, Whether an action for money had and received was maintainable by the Plaintiff againſt the Defendant under the above circumſtances? If ſo, then a verdict to be entered for the Plaintiff; but if the Court ſhould be of a contrary opinion, then a verdict to be entered for the Defendant.

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Vaughan Serjt. for the Plaintiff. This case falls within the general principle that where money has been paid upon a legal consideration which has failed, it may be recovered back in this form of action. Now the consideration upon which the Plaintiff paid to the Defendant as one of the legatees his proportion of the 300*l.* for which the house and close in *Rugby* were purchased, was the covenant of the three other trustees to convey to him the above premises with a good title. But the limitation to the personal representatives of the settlor in the deed of 1761 being too remote after an estate tail (*a*), and the whole interest in the remainder of the term having under that deed of settlement vested absolutely in the testator's son, there was nothing upon which the devise to *Edward Boddington*, *Thomas Walker*, *Joseph Johnson*, and *Philip Williams*, could operate, and consequently the three covenanting trustees were unable to fulfil their covenant. The question therefore is, Whether the Defendant who as a legatee has received money from the Plaintiff on the consideration of the trustees conveying a good title, can retain that money now the title proves bad? If it be said that the purchaser is bound to guard himself by proper covenants, the same answer might have prevailed in *Picketon* v. *Litecote* and Others, *Vin. Ab.* v. 21. p. 541. tit. *Vendor and Vendee* (B); and yet there a *subpœna* is said to have issued against a vendor to shew cause why he should not repay the money received upon a sale of the reversion of a copyhold which the vendee could not enjoy. Indeed the principle upon which the case of *Shove* v. *Webb*, 1 *T. R.* 732. proceeded is very applicable to the present; for there a party was allowed to recover back the money paid as the consideration for an annuity, the annuity having been set aside for a defect in the memorial; and yet it might have been contended there, that it was the Plaintiff's own fault that the annuity was set aside, because he had not secured himself by a proper memorial. But the case of *Cripps* v. *Reade*, 6 *T. R.* 606. is decisive in favour of the Plaintiff's demand; there, as in this case, the conveyance of the property purchased by the Plaintiff not having actually taken place, but the whole still remaining *in fieri*, the Plaintiff recovered back his purchase money on the title proving defective. Lord *Kenyon* in that case adverted

(*a*) Where there is an express limitation of a chattel by words, which if applied to a freehold would create an *express estate-tail*, the whole interest vests absolutely in the first taker, and a limitation over of such a chattel is too remote to take effect." *D. per Ashhurst* J. *Doe* d. *Lyde* v. *Lyde*, 1 *T. R.* 596. and admitted *per Buller* J. *ibid.*

to the rule of *caveat emptor*, as laid down in *Bree* v. *Holbech*, *Doug.* 655. and ſaid he did not wiſh to diſturb it, but diſtinguiſhed the caſe then in judgment on the ground of no conveyance of the purchaſed property having been executed to the purchaſer. So here the indenture of aſſignment having been executed by two only of the four truſtees and by no other perſon, the conveyance remained incomplete, and the Plaintiff is entitled to recover back from the Defendant that money which the latter cannot in conſcience retain.

Bayley Serjt. *contrà*. The Plaintiff is not entitled to recover back the money which he has paid from any perſon; but if he be entitled to recover it back, ſtill he cannot recover it from the preſent Defendant, nor in this form of action. There is no fraud in this caſe, and therefore the rule of *caveat emptor* muſt prevail as laid down in *Bree* v. *Holbech*. Indeed the proper remedy for the Plaintiff to adopt is to ſue the three truſtees, who by the article entered into in 1791 covenanted to convey. [Lord *Alvanley* Ch. J. If he were to ſue on that article he would recover 1*s.* damages in a court of law, and a court of equity would not compel the truſtees to convey that to which they had no title.] The caſe of *Cripps* v. *Read* is diſtinguiſhable from the preſent, becauſe there the action was brought againſt the very party who had ſold the property as well as received the money, and the ſale reſted merely on a parol undertaking, and not as in this caſe on an article executed by thoſe in whom the right to convey was ſuppoſed to be. But at all events the preſent Defendant is not liable to be ſued, for the contract of ſale and the covenant to convey was made by the truſtees with the Plaintiff, and the Defendant was no party to that contract. The rule therefore applies that where an expreſs contract between the Plaintiff and other parties is proved, the Court will not imply a contract between the Plaintiff and Defendant reſpecting the ſame ſubject matter. Indeed the only way in which the legatees were concerned in the tranſaction was in giving their conſent to what the truſtees thought fit to do. Nor is this the proper form of action to recover the money which has been paid, for the ſpecial contract is not reſcinded, and till that is done the action for money had and received cannot be ſuſtained. That the contract is not reſcinded appears from the Plaintiff ſtill retaining part of his purchaſe; now as the ſale of the whole was entire, the Plaintiff is not at liberty to reſcind the contract in part and con-

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ſider it as ſtill ſubſiſting as to the remainder. Had this property been ſold in parcels and by two diſtinct contracts, poſſibly a very different price would have been demanded and paid. The action is altogether novel, being an attempt to ſue legatees in a court of law, and to recover part of the money paid under a ſpecial contract, by treating that contract as reſcinded in part.

Vaughan in reply obſerved, that the Defendant was not ſued as a legatee, but as one retaining money paid to him upon a conſideration which had failed, and which he therefore could not in conſcience retain. He added, that to ſue the truſtees would only produce a multiplicity of actions, for they would of courſe ſue the legatees if the Plaintiff recovered againſt them; and that the valuation of the houſe in *Rugby* and the valuation of the plot of land being diſtinct, the Plaintiff had a right to treat them as two diſtinct contracts, and conſequently might reſcind the one and abide by the other.

Cur. adv. vult.

The opinion of the Court was this day delivered by

Lord ALVANLEY Ch. J. who after ſtating the caſe proceeded thus:—The premiſes out of which the preſent diſpute ariſes were, together with the plot of land in *Rugby* field, purchaſed by the Plaintiff for the groſs ſum of 1000 *l.*; but, it is to be remembered that the houſe in *Rugby* and the plot of land in *Rugby* field were each diſtinctly valued, the former at the ſum of 300 *l.* and the latter at the ſum of 700 *l.*; and upon thoſe diſtinct valuations that contract was entered into which was afterwards reduced into the form of an agreement, and that deed of agreement was prepared which was executed by two only of the truſtees, and by no other perſon. The contract having been thus far carried into execution, it was diſcovered that the limitation to the repreſentatives of the ſettlor in the deed of 1761 was too remote, in conſequence of which an ejectment was brought by the perſon entitled, and the Plaintiff, who had paid the money, but to whom no legal conveyance had been made, was evicted from the poſſeſſion. The flaw therefore being diſcovered before the purchaſe was completed, there is no pretence to ſay that the Plaintiff had bought the eſtate, and that having obtained the title for which he contracted, he muſt abide by the conſequences. The Plaintiff, upon being evicted, was obliged to refund the rents and profits, and ſeveral of the perſons intereſted conſented to repay their proportions of the purchaſe-money; but

ſome (among whom is the preſent Defendant) have refuſed; and the queſtion now is, Whether under theſe circumſtances the Plaintiff be entitled to recover againſt the Defendant in an action for money had and received? My Brother *Heath* nonſuited the Plaintiff at the trial, on the idea that the object of the action was to call upon a legatee to refund a legacy; a matter which he thought could only be agitated in a court of equity. It turns out however that this is not an action for re-payment of a legacy. If ſuch had been the object of the action, I agree that it could not have been maintained. If an executor, thinking that he has ſettled the affairs of his teſtator, pay the legacies, I have no difficulty in ſaying that a court of common law would not entertain an action for money had and received againſt a legatee, ſince ſuch a court cannot take into conſideration, as a court of equity would do, the mode in which the funds might have been applied. In the caſe of *Moſes* v. *Macferlan*, 3 *Burr.* 1005., ſome principles were laid down, which are certainly too large, and which I do not mean to rely on: ſuch as that, wherever one man has money which another ought to have, an action for money had and received may be maintained; or that wherever a man has an equitable claim he has alſo a legal action. I agree with the opinion of my Lord Chancellor in the caſe of *Cooth* v. *Jackſon*, 6 *Veſ.* Jun. 39. where he expreſſes his doubt whether the courts of law have not gone too far in the diſcuſſion of equitable rights, ſince they cannot adminiſter equity in the ſame way as courts of equity do; and ſhews that great injuſtice may ariſe from ſuffering a Plaintiff to prevail in a court of law, whereas, if he were obliged to ſeek his remedy in a court of equity, much would alſo be provided in the Defendant's favour. No man therefore is more diſpoſed to be cautious in admitting equitable matters to be agitated in a court of law than myſelf. But as this is not a caſe between an executor and a legatee, in which the former ſeeks to recover the amount of any legacy paid to the latter, but between the purchaſer and vendor of an eſtate, my difficulty has been how far the agreement is to be conſidered as one contract for the purchaſe of both ſets of premiſes, and how far the party can recover ſo much as he has paid by way of conſideration for the part of which the title has failed, and retain the other part of the bargain. This for a time occaſioned doubts in my mind: for if the latter queſtion were involved in this caſe it would be a ſubject for a court of equity. If the queſ-

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tion were how far the particular part of which the title has failed formed an eſſential ingredient of the bargain, the groſſeſt injuſtice would enſue if a party were ſuffered in a court of law to ſay that he would retain all of which the title was good, and recover a proportionable part of the purchaſe-money for the reſt. Poſſibly the part which he retains might not have been ſold unleſs the other part had been taken at the ſame time: and ought not to be valued in proportion to its extent, but according to the various circumſtances connected with it. But a court of equity may inquire into all the circumſtances, and may aſcertain how far one part of the bargain formed a material ground for the reſt, and may award a compenſation according to the real ſtate of the tranſaction. In this caſe however no ſuch queſtion ariſes: for it appears to me that although both pieces of ground were bargained for at the ſame time, we muſt conſider the bargain as conſiſting of two diſtinct contracts; and that the one part was ſold for 300 *l.* and the other for 700 *l.* It has not been ſuggeſted that they were neceſſary to the occupation of each other. It amounts therefore to no more than this: that the Plaintiff being one of the executors who were about to ſell the houſe, and alſo to ſell the land, to both of which the legatees undertook to make a good title, advanced his money to the legatees on the purchaſe of thoſe two lots, and now ſeeks to recover back the money for one of them, becauſe the title to that has proved defective. We by no means wiſh to be underſtood to intimate that where under a contract of ſale a vendor does legally convey all the title which is in him, and that title turns out to be defective, the purchaſer can ſue the vendor in an action for money had and received. Every purchaſer may protect his purchaſe by proper covenants: where the vendor's title is actually conveyed to the purchaſer the rule of *caveat emptor* applies. In the preſent caſe the Plaintiff never has had any title conveyed to him, and therefore we are of opinion, notwithſtanding the party ſued is a legatee, that the Plaintiff has paid his money under a miſtake, conſequently the rule adopted in courts of law in ſuch caſes applies to him, and entitles him to recover that money from the party to whom it has been paid in an action for money had and received.

Per Curiam, Judgment for the Plaintiff.

PITCHER *v.* MARTIN. *May* 31ſt.

In *C. B.* a plea of bankruptcy muſt be ſigned by a Serjeant.

IN this caſe a queſtion aroſe, Whether a plea of bankruptcy ought to be ſigned by a Serjeant?

The Court, after referring to the officers, decided that by the practice of this Court ſuch a plea muſt be ſigned by a Serjeant, and might be treated as a nullity if not ſo ſigned (*a*).

(*a*) A tender of iſſue muſt be ſigned by a Serjeant, but a joinder in iſſue need not. Vide *Ellis* v. *Govey*, *ante*, vol. 1. p. 469. Both a demurrer and a joinder in demurrer muſt be ſo ſigned. *Brooker* v. *Simſon*, *ante*, vol. 2. p. 336. *Douglas* v. *Child*, *ibid. in notis*.

END OF EASTER TERM.

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CASES

ARGUED and DETERMINED

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

IN

Trinity Term,

In the Forty-ſecond Year of the Reign of GEORGE III.

June 21ſt.

PARTRIDGE *v.* SOWERBY.

A. agreed to under-let his houſe to *B.* the latter paying for the furniture at an appraiſement; held that *B.* was excuſed from the performance of the agreement, becauſe *A*, at the time he quitted the houſe, was in arrear for rent to his landlord.

ASSUMPSIT upon a ſpecial agreement.

The cauſe was tried before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after laſt *Eaſter* term, when it appeared that an agreement was entered into between the Plaintiff and the Defendant that the former, who was tenant of a certain houſe, ſhould let the ſame to the latter for a year from the *Chriſtmas-day* then following, and that whatever houſehold furniture ſhould be left by the Plaintiff upon the premiſes ſhould be appraiſed, and that the Defendant ſhould take it at the appraiſed value, and that the money ſhould be paid on or before the 1ſt of *January* then next. At *Chriſtmas-day* the Plaintiff quitted the houſe, leaving ſome furniture upon the premiſes; he offered poſſeſſion to the Defendant, and gave him notice that a broker would attend to value the furniture. The Defendant refuſed to fulfil the agreement on account of ar-

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rears of rent being due from the Plaintiff to the landlord. Upon this evidence his Lordſhip nonſuited the Plaintiff. 1802.

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Clayton Serjt. now moved for a rule to ſhew cauſe why the nonſuit ſhould not be ſet aſide, urging that as the Plaintiff had done every thing to fulfil his part of the agreement, the Defendant was bound to perform what he had contracted for.

But *The Court* were of opinion that as the furniture was liable to be diſtrained for the arrears due from the Plaintiff to his landlord, the Defendant was not bound to take them, and was therefore excuſed from the performance of the agreement.

Clayton took nothing by his motion.

(IN THE EXCHEQUER CHAMBER.)

HAGUE Gent. One, &c. *v.* FRENCH; in Error. *June* 25th.

ERROR from a judgment of the Court of King's Bench in an action of *aſſumpſit*, brought by the payee againſt the acceptor of a bill of exchange. The 1ſt count of the declaration ſtated that one *R. C.*, "heretofore, to wit, on the 15th day of *September* in the year of our Lord 1800, &c. according to the uſage. &c. drew her certain bill of exchange in writing, bearing date the day and year aforeſaid, and thereby required the Plaintiff in error to pay to the Defendant in error, two months after the date of the ſaid bill, the ſum of 19*l.* 18*s.* 7*d.*," and proceeded to allege acceptance by the Plaintiff in error, and his promiſe to pay. The 2d count was, "And whereas the ſaid *R. C.* afterwards, to wit, on the ſame day and year aforeſaid, at, &c. according to the uſage, &c. made and drew her certain other bill of exchange in writing upon the ſaid Plaintiff in error, and thereby required him to pay to the Defendant in in error, two months after date thereof, 19*l.* 18*s.* 7*d.* value received;" and then proceeded as the firſt count, averring acceptance of the bill by the Plaintiff in error; "to wit, on the ſame day and year aforeſaid;" and his promiſe to pay. Upon this declaration there was judgment below by *nil dicit*, and a writ of inquiry executed; the Plaintiff in error, after aſſigning the general errors, proceeded thus: "That the damages have been aſſeſſed for and

If a bill of exchange be made payable two months after date, and no date be expreſſed, the Court will intend it to be payable two months after the day on which it was made. The firſt count of a declaration ſtated that the Defendant heretofore, to wit, on ſuch a day, drew a bill of exchange, bearing date the day and year aforeſaid, payable two months after date. The ſecond count ſtated that afterwards, to wit, on the day and year aforeſaid, the Defendant drew a certain other bill of exchange, payable two months after date; without mentioning any expreſs date in either count. Held that both counts were good.

adjudged

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adjudged to the ſaid Defendant in error upon the whole of the aforeſaid declaration generally, whereas it appears in and by the record aforeſaid that the ſecond count of the ſaid declaration was and is inſufficient in law, and that no damages could or ought by law to have been aſſeſſed or adjudged to the ſaid Defendant in error in reſpect thereof, or of the ſuppoſed promiſe and undertaking therein mentioned," praying in the uſual form that the judgment might be reverſed.

Barrow for the Plaintiff in error now objected that the ſecond count of the declaration could not be ſuſtained, inaſmuch as no date to the bill was ſtated; for the bill being payable at two months, without a date, it was impoſſible to aſcertain the time of payment; that although in *De la Courtier* v. *Bellamy*, 2 *Show.* 422. the Court held that it might be intended that the date of the bill was the day of the drawing, yet in that caſe the day on which the bill was drawn was expreſsly ſtated, whereas in the preſent caſe the day of the drawing was only to be collected from words of reference to the firſt count, where the day of drawing was laid under a *to wit*.

Lawes contrà was ſtopped by *the Court*, who were of opinion that the caſe was not diſtinguiſhable from *De la Courtier* v. *Bellamy*, and that they might well intend the date of the bill to have been the day of the drawing ſtated in the firſt count.

Judgment affirmed.

June 29th.

MACDONNELL *v.* MACDONNELL.

If a declaration in debt demand 2000 *l.* and contain ſeveral counts, each of which ſtates a debt of 224 *l.* 7 *s.* 4½ *d.* and the Defendant plead thereto that he does not owe the ſaid ſum of 224 *l.* 7 *s.* 4½ *d.* the Plaintiff may ſign judgment for want of a plea.

A DECLARATION in debt demanded 2000 *l.* and contained ſeveral counts, each of which ſtated a debt of 224 *l.* 7 *s.* 4½ *d.* The Defendant, after having obtained time to plead upon the uſual terms of pleading iſſuably, put in a plea that the Defendant did not owe to the Plaintiff the ſaid ſum of 224 *l.* 7 *s.* 4½ *d.* concluding to the country; whereupon the Plaintiff ſigned judgment as for want of a plea.

Bayley Serjt. having obtained a rule to ſhew cauſe why this judgment ſhould not be ſet aſide,

Shepherd and *Marſhall* Serjts. ſhewed cauſe, and urged that the plea muſt be conſidered as a nullity, ſince it clearly was no anſwer to the whole declaration, the amount of the debt claimed being 2000 *l.*; and as it was not pleaded to any particular count, it could

not be applied to any particular count.

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MACDONNELL v. MACDONNELL.

Bayley on the other hand inſiſted, that although the plea were not a complete anſwer to the whole declaration, yet that the judgment ought not to have been ſigned for the whole ſum mentioned in the declaration, but ought to have been taken for all except 224*l.* 7*s.* 4½*d.*, for that the plea might be taken to apply to the firſt count of the declaration.

But *The Court* were of opinion that as the plea was pleaded to the whole declaration it muſt be conſidered as no plea within the meaning of the Judges' order.

Rule diſcharged.

KENRICK *v.* Lord WM. BEAUCLERCK.

July 2d.

THE following caſe was ſent by the Lord Chancellor for the opinion of this Court:

Thelwall Price, late of *Bathafern Park* in the county of *Denbigh* Eſq. being at the time of making his will hereinafter ſet forth, and at the time of his death, ſeiſed to him and his heirs of divers lands in the ſeveral counties of *Denbigh*, *Flint*, *Merioneth*, *Caernarvon*, and *Angleſea*, duly made and publiſhed his ſaid laſt will and teſtament in writing, the material clauſes of which were as follow; "And as to my real and perſonal eſtate whatſoever and wherefoever, ſubject to and chargeable with my juſt debts and funeral expences, I give, deviſe, bequeath, and diſpoſe thereof as follows; that is to ſay, I give, deviſe, and bequeath my real eſtates, lands, tenements, and hereditaments in the ſeveral counties of *Denbigh*, *Flint*, *Merionethſhire*, *Caernarvonſhire*, and *Angleſea*, and elſewhere, and alſo all my perſonal eſtate, goods, chattels, and effects whatſoever unto *John Moſtyn* of *Segroit* in the ſaid county of *Denbigh* Eſq. and *Owen Wynne* of *Croſſneweydd* in the ſaid county of *Denbigh* Eſq. and their heirs, upon truſt, and to and for the ſeveral uſes, truſts, intents, and purpoſes following; that is to ſay, To the intent that the ſaid *John Moſtyn* and *Owen Wynne* and the ſurvivor of them, and the heirs, executors, and adminiſtrators of ſuch ſurvivor, ſhall and do in the firſt place apply and diſpoſe of my perſonal eſtate, or ſo much thereof as ſhall be ſufficient for that purpoſe,

A. deviſed thus, "As to my real and perſonal eſtate, ſubject to my debts and funeral expences, I give and deviſe the ſame as follows, *viz.* my real eſtates, and alſo my perſonal eſtate, unto *J. M.* and *O. W.* and their heirs on the following truſts, *viz.* to the intent that they diſpoſe of my perſonal eſtate in diſcharge of my debts, funeral expences, and ſuch legacies as I may direct and as to my real eſtates, ſubject to my debts and ſuch charges as I may make, I give and deviſe the ſame to *R. P.* for life. Held that under this devise the legal eſtate in the realty veſted in *R. P.* for his life, and *J. M.* and *O. W.* took no eſtate therein.

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purpoſe, to and in payment of all my juſt debts and funeral expences, and to and in diſcharge of all ſuch legacies as I may by this or any future will or codicil direct to be paid, and alſo in diſcharge of ſuch expences as my truſtees ſhall be at in diſcharging the truſts of this my will; and as to all my real eſtates whatſoever and whereſoever, ſubject to my debts and ſuch charge and charges as I may now or at any time or times hereafter think proper to make, I give, deviſe, and bequeath the ſame unto my Couſin *Richard Price*, only ſon of *William Price* of *Rhewlas*, for and during the term of his natural life." He then entailed the eſtates, on the iſſue male and female of the ſaid *Richard Price*, in ſtrict ſettlement; and in default of ſuch iſſue, deviſed them to the Rev. *Robert Carter* of *Redbourn* in the county of *Lincoln* for his life; and after his death to his iſſue male and female in ſtrict ſettlement; and, in default of ſuch iſſue, to *Richard Kenrick*, eldeſt ſon of *Andrew Kenrick*, of the city of *Cheſter* Eſq. for and during the term of his natural life; and after his deceaſe, to his iſſue male and female, in ſtrict ſettlement, and added a proviſo, that whoever ſhould take the eſtates ſhould bear the ſurname of *Thelwall*, and make the manſion-houſe at *Bathaſern Park* their uſual and common place of abode and reſidence; and on their refuſal ſo to do, declared the above deviſe void, and bequeathed his eſtates to his own right heirs for ever.

The queſtions for the opinion of the Court were, 1ſt, Whether the truſtees in the will of the teſtator *Thelwall Price* took any eſtate at law? 2dly, Whether the tenant for life took any eſtate at law?

Lens Serjt. for the Plaintiff. The queſtion is, Whether any legal eſtate in the lands deviſed veſted in the truſtees? or, Whether the whole legal eſtate did not veſt by the operation of the ſtatute of uſes in the *ceſtuy que truſt?* The general principle of law may be admitted, that where truſtees are interpoſed merely for the ſake of interpoſing them, and they have nothing to do but what might be done by the *ceſtuy que truſt*, ſuch interpoſition is uſeleſs, and the ſtatute veſts the legal eſtate in the *ceſtuy que truſt*. It was formerly ſaid in the caſe of *Burchett* v. *Durdant*, 2 *Vent.* 312. that where lands were deviſed to *A.* in truſt to permit and ſuffer *B.* to receive the rents and profits, the legal eſtate veſted in *A.*, and *B.* held only a truſt. But that caſe was afterwards over-ruled in *Broughton* v. *Langley*, 2 *Salk.* 679. 1 *Lutw.* 814: and indeed in *Burchett* v. *Durdant*,

A. was created a truſtee for no other purpoſe than that of receiving with one hand in order to pay over with the other. But where any thing is appointed to be done by the truſtee beyond the mere receipt of the profits, the eſtate muſt remain in him for the purpoſe of enabling him to diſcharge the truſt which the teſtator has directed that he and no one elſe ſhall execute. In this caſe the teſtator firſt expreſſes his intention to make the deviſe of his real and perſonal eſtate ſubject to and chargeable with his juſt debts and funeral expences, and then deviſes firſt his real eſtates and then his perſonal eſtates to truſtees, directing the application of the perſonal eſtate to the payment of debts, funeral expences, and legacies, and then deviſes his real eſtates to the tenant for life, ſubject to his debts and ſuch charges as he may make upon them. The deviſe to the truſtees therefore, coupled with the firſt expreſſions of the will, impoſes on them the duty of paying the debts, and conſequently gives them the legal eſtate. However ſlight the object of the truſt may be, it is ſufficient that the teſtator has appointed the truſtees as the perſons to carry that object into execution: and the ſtatute will not operate to veſt the eſtate in the *ceſtuy que truſts* unleſs they would take preciſely the ſame eſtate as the truſtees. The eſtates indeed are given to the deviſee, ſubject to the payment of debts: but until that payment has been made the eſtates do not veſt in him. And though if the eſtates were immediately veſted in him the Court of Chancery would make him a truſtee for the payment, yet as the teſtator has thought proper to appoint other perſons as truſtees for that purpoſe, the legal eſtates muſt veſt in them in order to enable them to execute that intention. In the caſe of *Bagſhaw* v. *Spencer*, 1 *Veſ.* 144. Lord *Hardwicke* laid great ſtreſs upon the whole fee being conveyed to the truſtees by the word "heirs," in which reſpect, he ſaid, it differed from other caſes which he cited, where nothing but a chattel intereſt was conveyed to the truſtees. The caſe of *Shapland* v. *Smith*, 1 *Brown's Chan. Ca.* 75. is a ſtrong authority to ſhew that where the truſtees have any thing to do the legal eſtate will veſt in them: for in that caſe the truſtees, after deducting rates, taxes, and repairs, were to pay over the reſidue of the profits to the deviſee for his life; and yet they were held to take a legal eſtate. So in *Silveſter* d. *Lane* v. *Wilſon*, 2 *T. R.* 444. where the deviſe was to truſtees in truſt to receive the rents and profits during the life of *A.*, and that ſuch rents and profits ſhould be applied for the ſubſiſtence and maintenance of *A.* during his life, the truſtees took a legal eſtate.

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And in the case of *Doe* d. *Blake* v. *Luxton*, 6 *T. R.* 289. where all the trusts had been executed, and nothing remained to be done by the trustees, yet having once taken a legal estate, Lord *Kenyon* was of opinion that without a surrender of their estate the devisee could not maintain an ejectment.

Bayley Serjt. *contrà*. I do not dispute any of the cases which have been cited, but I deny their application to the case before the Court. It is clear that if it had appeared upon the face of this will that the trustees were directed to do any thing they must have taken a legal estate: but in this will there are no directions to that effect. The testator has not directed them to pay the debts out of the real estate: the payment of the debts is only made a charge upon the devisees. Where the testator intended that they should have any management of his property he has so expressed himself in precise terms; for, with respect to his personal estate, he expressly gives it to the trustees upon trust to pay his debts, legacies, and funeral expences. But in the disposition of his real estate he employs no words to shew that the trustees were to have the disposal of the profits.

Cur. adv. vult.

The opinion of the *Court* was this day delivered by

Lord ALVANLEY Ch. J. We have looked into the cases to see whether any thing was to be found to alter the opinion which we formed upon the argument. But those cases all tend to shew that the question upon which the present case must depend is this, *viz.* Whether sufficient appears upon the face of this will to demonstrate an intention in the testator that the trustees should pay the debts? The cases are very accurately stated in my Brother *Williams*'s edition of *Saunders*, in a note to *Jeffreson* v. *Morton* (*a*), and I cannot lay down the principle in better terms than he has used. He states the rule by which it is to be decided whether the estate be an use executed or a trust, in these words; "Where something is to be done by the trustees which makes it necessary for them to have the legal estate, such as payment of the rents and profits to another's separate use, or of the debts of the testator, or to pay rates and taxes, and keep the premises in repair, or the like, the legal estate is vested in them, and the grantee or devisee has only a trust estate." The case of *Doe* d. *Blake* v. *Luxton* affords no argument in favour of the Plaintiffs in this case; for it was necessary there

(*a*) 2 *Saund.* p. 11. n. 17.

that the truſtees ſhould take a legal eſtate for the purpoſe of executing the truſts; and the ſame may be ſaid of *Harton* v. *Harton*, 7 *T. R.* 652. where the eſtate was limited to truſtees upon truſt to permit three married women ſucceſſively to take the rents and profits. In the latter caſe Lord *Kenyon* ſays, that *Jones* v. Lord *Say and Seal* 8 *Vin. Abr.* 262. is a caſe by itſelf, by which I ſuppoſe he means that it is a doubtful caſe, though he admits that it had been recogniſed to be law by Lord *Hardwicke* in *Bagſhaw* v. *Spencer*. And indeed that caſe tends to ſhew that even where ſomething might remain to be done by the truſtees the eſtate might be executed in the deviſee: for it was held that by the words of the will the uſe was executed in the truſtees and their heirs during the life of the feme covert, and after her death it was executed in the perſons entitled to take, charged with the annuities. The other caſes of *Shapland* v. *Smith* and *Silveſter* d. *Law* v. *Wilſon*, only illuſtrate the principle ſtated in my Brother *Williams*'s note. Unleſs therefore it appears manifeſtly that the teſtator intended that the truſtees ſhould be active in paying the debts, the legal eſtate will not veſt in them. The queſtion is, Whether there be any ſuch apparent intention on the face of this will? It would indeed be much more convenient that the legal eſtate ſhould be veſted in truſtees for the payment of the debts than that the truſt ſhould be executed by the deviſee, under the direction of a court of equity; for a court of equity could not enable the deviſee to make a complete title to the eſtate: But this is only an argument *ab inconvenienti*, from which we cannot conſtrue the teſtator to have ſaid what in fact he has not ſaid. Perhaps if it had been ſuggeſted to him he would have directed that the payment ſhould be made by the truſtees; but he has not done ſo. This is a mere deviſe charged with the payment of debts. In diſpoſing of the perſonal eſtate the teſtator directs the truſtees to pay his debts, legacies, and funeral expences; but in the limitation of the real eſtate he does not even ſay *after* payment of his debts and ſuch charges as he ſhall make, to the uſe of the tenant for life, but *ſubject* to his debts and ſuch charges as he ſhall make. Upon theſe grounds we are all of opinion, and ſhall ſo certify, that the truſtees took no legal eſtate in the premiſes, but that *Richard Price* took an eſtate at law for life, charged with the payment of debts.

v. Lord W. Beauclerck.

The following certificate was ſent to the Lord Chancellor.

This caſe has been argued before us, and we are of opinion that the truſtees named in the will of *Theluall Price* did not take any eſtate at law in the real eſtates deviſed by the ſaid will.

We are alſo of opinion, that *Richard Price*, the tenant for life, took a legal eſtate in the ſaid real eſtates.

ALVANLEY.
T. HEATH.
G. ROOKE.
A. CHAMBRE.

June 30th.

DECKER *v.* SHEDDEN.

A ſummons for further time to plead, not attended by the party taking it out, does not wave the neceſſity of a rule to plead.

IN this caſe a declaration *de bene eſſe* was delivered to the Defendant's attorney on the 13th of *May*, and on the ſame day a rule to plead was given, which was by miſtake entered in the *King's Bench* inſtead of this Court; on the 17th of *May* the Defendant entered an appearance, and a plea was demanded; on the ſame day the Defendant took out a ſummons for further time to plead, but did not attend at the return of the ſummons; on the 20th of *May* the Plaintiff ſigned judgment for want of a plea.

To ſet aſide this judgment for irregularity, inaſmuch as the Defendant had not been properly ruled to plead, a rule *niſi* was obtained on a former day (*a*).

Shepherd and *Lens* Serjts. now ſhewed cauſe and inſiſted that the irregularity complained of had been waved by the Defendant's taking out a ſummons for further time to plead, and cited *Towers* v. *Powel*, 1 *H. Bl.* 87. where a Plaintiff having obtained time to declare, the Court held a rule to declare unneceſſary in order to ſupport a judgment of *non pros*; that rules to plead are only given in order to apprize the Defendant when he is to plead, and that a Defendant by praying time to plead excludes any preſumption that he is not aware of the time at which he ought to plead. *Starkie* v. *Wilkes*, *Mich.* 7 *Geo.* 2. *B. R.* 1 *Cromp. Pr.* 162.; and that although an order was obtained in that caſe, yet the principle applies equally to caſes where a ſummons only is taken out as to the caſes where an order is made; and that it appeared from *Rivers* v. *Plumbe*, *Barnes*, 240. ed. 3. and *Brown* v. *Godfrey*, *Cooke's Caſ. Pr.* 144. that a ſummons when returnable was formerly ſo far an effectual proceeding, that if not attended by the party taking it out, the other ſide could not ſign judgment without having previouſly diſcharged the ſummons. [But *The Court* ſaid that was wholly unneceſſary at the preſent day.]

(*a*) This matter had been before the Court in the preceding term, when the rule was diſcharged, it being rather underſtood at that time that in *Towers* v. *Powel* there had been no order. But in this term *Beſt* Serjt. ſtated to the Court the miſtake alluded to, and obtained leave to bring the matter before the Court again.

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Best Serjt. in support of the rule urged, that a mere summons for further time to plead not attended by the party taking it out was no waver, and that on this ground the present case was distinguishable from *Towers* v. *Powel*.

The Court were of opinion that the summons for time to plead did not wave the necessity of a rule to plead, that summons not having been followed up by an order.

Rule absolute.

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July 5th.

A. having sold certain leasehold premises to *B.*, assigned them by indenture, containing a proviso that *B.* should not assign over until the whole of the purchase-money should have been paid, and *B.* and *C.* covenanted for themselves, their executors, administrators, and assigns for the payment of the money. The premises having been taken in execution for a debt of *B.*, who had not paid the purchase-money, were sold by the sheriff to *D.*, who paid down a deposit and agreed to complete the purchase on having a good title. Held that the non-payment of the purchase-money by *B.* was a sufficient objection to the title, and that *D.* might recover back his deposit in an action for money had and received.

THIS was an action for money had and received, and was brought to recover from the Defendant as auctioneer the sum of 45*l.* being the amount of a deposit paid into his hands by the Plaintiff on the purchase of a leasehold estate.

The cause was tried at the *Guildhall* Sittings in this term before Mr. Justice *Chambre*, when a verdict was found for the Plaintiff, with liberty to the Defendant to apply to the Court to have a non-suit entered. The facts of the case were as follow: *William Emblin* being possessed of a lease of certain premises wherein he carried on a school, agreed with *Morgan William Johnes* for the sale of the said lease, together with the good-will of the school for 1000*l.* and certain goods and fixtures upon the premises to be paid for according to valuation. It was agreed that the said 1000*l.* together with the amount of the valuation of the said goods and fixtures, should form an aggregate sum to be paid and secured by the said *M. W. Johnes* to the said *William Emblin*, and that on payment of 500*l.* part thereof on the 25th of *December* then next, possession of the lease and premises, goods, fixtures, and effects, should be delivered up and absolutely assigned to the said *M. W. Johnes*. By indenture of the 7th of *January* 1801, between *William Emblin* of the first part, *M. W. Johnes* of the second part, and *Matthias Pierce* of the third part, reciting the original lease to *William Emblin*, and the said agreement, and that the goods and fixtures had been valued at 390*l.* and that 500*l.* had been paid in pursuance of the said agreement by the said *M. W. Johnes* to the said *William Emblin*, the said *William Emblin* assigned over the goods and fixtures absolutely, and the leasehold premises for the remainder of the term, subject to the rents, covenants, conditions,

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ditions, and agreements therein expreſſed and contained. The indenture contained the following proviſo: "Provided always, and theſe preſents are upon this condition nevertheleſs, that he the ſaid *M. W. Johnes*, his executors and adminiſtrators, ſhall not nor will at any time or times hereafter (until the money agreed to be paid and ſecured unto the ſaid *William Emblin*, his executors, adminiſtrators, and aſſigns, by the ſaid *M. W. Johnes*, his executors and adminiſtrators, amounting to 890*l.* for the good-will and purchaſe of the ſaid goods and fixtures in the ſaid recited agreement contained, be paid and ſatisfied to the ſaid *William Emblin*, his executors, adminiſtrators, and aſſigns, and for the due payment of which the ſaid *M. Pierce* is the ſurety of the ſaid *M. W. Johnes*) underlet, leaſe, aſſign, tranſfer, or ſet over unto any perſon or perſons for all or any part of the ſaid term in the ſaid recited indenture of leaſe mentioned, all or any part of the ſaid premiſes hereby aſſigned, without the joint licence and conſent of them the ſaid *William Emblin* and *Matthias Pierce*, in writing under their hands firſt had and obtained." The indenture alſo contained a covenant on the part of *M. W. Johnes* and *Matthias Pierce*, for themſelves, their executors, adminiſtrators, and aſſigns, for the payment of the remaining ſum of 890*l.* by inſtalments of 100*l.* each, on every ſucceſſive *Midſummer* and *Chriſtmas* day, and 90*l.* on the laſt inſtalment, with a proviſo, that *Matthias Pierce* ſhould not be called upon until after two months' notice of the default of *M. W. Johnes*. The leaſehold premiſes above mentioned having been taken in execution under a *fieri facias* for a debt due from the ſaid *M. W. Johnes* to Meſſrs. *Smith* and Co. of 641*l.* 12*s.* were put up to ſale by public auction on the 13th of *January* 1802. Among the terms of ſale was contained an article, that the purchaſer ſhould pay down immediately a depoſit of 20*l. per cent.* in part of the purchaſe money, and ſign an agreement for payment of the remainder on or before the 2d of *February* 1802, on having a good title, when poſſeſſion would be given. The Plaintiff became the purchaſer at ſuch ſale for the ſum of 260*l.* and paid a depoſit of 45*l.* But afterwards objecting to the title, refuſed to complete the purchaſe, and brought this action to recover the depoſit.

Shepherd Serjt. now moved for a rule *niſi* for entering a nonſuit. Two objections have been made to the title; 1ſt, That the ſheriff was not entitled to aſſign the leaſe on account of the proviſo reſtraining *Johnes* and his aſſigns from transferring or aſſigning

without the joint licence of *William Emblin* and *Matthias Pierce*, and 2dly, That if the Plaintiff ſhould complete his purchaſe and take an aſſignment of the premiſes, he would be liable by the covenant in the deed as aſſignee of *M. W. Johnes* to make good to *William Emblin* the remaining inſtalments yet unpaid. The caſe of *Doe* d. *Mitchenſon* v. *Carter*, 8 *T. R.* 57. puts an end to the firſt objection, it having been there expreſsly decided, that a ſale of leaſehold premiſes under an execution did not fall within the terms of a proviſo againſt aſſigning, becauſe it was a proceeding *in invitum*. And whether the proviſo be not to aſſign generally, or not to aſſign until a particular event ſhall have happened, the operation of law is the ſame. With reſpect to the ſecond objection, the covenant of *M. W. Johnes* and *Matthias Pierce* is not a covenant running with the land, but is a covenant in groſs, and merely binding upon them perſonally. It is true that the covenant contains the word "aſſigns," and that there are caſes where the aſſignee will be bound by that word, though he will not without it. But it is manifeſt in the preſent caſe, that the word "aſſigns" could never have been intended to deſcribe the aſſignees of the premiſes in queſtion; for the covenant is joint, and the word "aſſigns" applies equally to *M. W. Jones* and to *Matthias Pierce*; but as the latter had no intereſt whatever in theſe premiſes, his aſſigns could never be the aſſignees of theſe premiſes. Nor does the covenant create any equitable lien on the premiſes. The parties, if they had thought proper, might have ſecured the inſtalments by a mortgage, but not having done ſo, they cannot make the aſſignees of the ſheriff liable to the payment of thoſe inſtalments.

Lord ALVANLEY Ch. J. If the purchaſer would be liable in equity it is a ſufficient objection. Suppoſe a man, having purchaſed an eſtate, aſſign it before the purchaſe-money has been paid, a court of equity will compel the aſſignee to pay that money, provided he knew at the time of the aſſignment that it had not been paid. Here *Johnes* obtained an aſſignment in conſideration of an undertaking to pay for the leaſe and fixtures; that conſideration money has not been paid. *Johnes* and *Pierce* for themſelves and their aſſigns covenant for the payment of that money: and there is a proviſo that *Johnes* ſhall not aſſign, until that money has been paid, without the conſent of *Emblin* and *Pierce*. Does not that create an equitable incumbrance? I think that a court of equity would

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hold it ſo, though I do not know that it would be binding at law. Now what is the nature of the Plaintiff's depoſit? Is it not made upon the condition that the purchaſe ſhall be completed free from all reaſonable objections? It is quite clear that a court of equity would not compel a ſpecific performance of the agreement for the purchaſe of theſe premiſes. If a bill were filed for that purpoſe it would be diſmiſſed with coſts. I think that the Plaintiff has made out a reaſonable objection to the title offered by the Defendant, and conſequently muſt recover his depoſit.

HEATH, ROOKE, and CHAMBRE Js. concurring,

Shepherd took nothing by his motion.

July 3d.

CONSTANTINE *v.* PUGH.

If a note for payment of the allowance to a priſoner under the Lord's Act be dated on a Saturday and delivered on a Monday, and contain a general promiſe to pay the allowance weekly, the priſoner is entitled to be diſcharged.

Qu. Whether ſuch a note ought not to contain an expreſs promiſe to pay the allowance on a Monday, although it be dated on that day of the week.

THE Defendant, who was a priſoner in execution, having been brought up under the Lords' Act (*a*), and remanded on receiving a note from the Plaintiff for the payment of 3*s.* 6*d. per* week, obtained a rule to ſhew cauſe why he ſhould not be diſcharged, on the ground of the note not being conformable to the directions of *ſ.* 13. of the act.

The note in queſtion was delivered to the Defendant on *Monday* the 21ſt of *June*, and was as follows:

"*Richard Conſtantine* v. *David Pugh.*

"I hereby promiſe to pay and allow to *David Pugh* the ſum of three ſhillings and ſixpence *per* week weekly for ſo long time as he ſhall continue in priſon in execution at my ſuit. As witneſs my hand this 19th day of *June* 1802.

(Signed) *Richard Conſtantine.*"

Beſt Serjt. when he obtained the rule, inſiſted that by the words of the act the creditor is required to "agree by writing, ſigned with his name or that of his attorney, to pay and allow weekly a ſum not exceeding two ſhillings and four-pence unto the ſaid priſoner, to be paid every *Monday* in every week, ſo long as any ſuch priſoner ſhall continue in execution;" the preſent note being dated on the 19th of *June*, which was a *Saturday*, and not being expreſſed to be payable on any other day, it muſt be taken to be

(*a*) 32 *Geo.* 2. *c.* 28.

payable

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payable on every *Saturday*, and consequently did not comply with the provisions of the act. He cited *Lench* v. *Pargiter*, *Doug.* 68.

Clayton Serjt. now shewed cause, and observed that the present case was distinguishable from that of *Lench* v. *Pargiter*, since the note was there expressed to be payable on every *Wednesday*, whereas in this case it was expressed generally to be payable weekly, and must be taken to be payable from the day on which it was delivered, *viz. Monday* the 21st.

But Lord ALVANLEY Ch. J. said, We are of opinion that this objection is fatal. Had this note been dated on *Monday* the 21st, I should have thought it sufficient: though my Brothers are of opinion that it ought to be expressed in the note that it is payable on a *Monday*, and that unless it be so expressed the note will not be good.

Per Curiam, Rule absolute.

EDMONSON v. PARKER.

July 7th.

THIS was an application to set aside a judgment, and writ of *fieri facias* issued thereon, for irregularity. It appeared by the affidavit of the Defendant that in 1793 he gave a warrant of attorney to confess judgment to the Plaintiff, soon after which he became a prisoner in the *Fleet*, and took the benefit of an insolvent act, which passed in 1794; that he then entered into business again, and on the 8th of *January* 1801 became a bankrupt, and on 28th *April* in the same year obtained his certificate; that after this the Plaintiff entered up a general judgment on the warrant of attorney given in 1793, and sued out a general writ of *fieri facias* thereon, under which the Defendant's goods, to the amount of 41 *l.* 3 *s.* 9 *d.* were levied on the 1st of *July* 1802. No dividend appeared to have been made under the commission of bankrupt.

The Defendant having given a warrant of attorney to confess judgment, took the benefit of an insolvent act, then became bankrupt and obtained his certificate; after which the Plaintiff entered up a general judgment and sued out a general execution. Held regular, no dividend appearing to have been made.

Best Serjt., in support of the rule, referred to the 5 *Geo.* 2. *c.* 30. *s.* 9. which directs that a certificate obtained by any person under a commission of bankrupt, who has before been discharged under an insolvent act, shall only discharge his person from arrest, but that the future estate and effects of such person shall remain liable to his creditors as before the making of the act (the tools of trade, the necessary household goods and furniture, and necessary wearing apparel of such bankrupt and his wife and children only excepted),

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unleſs the eſtate of ſuch perſon againſt whom ſuch commiſſion ſhall be awarded ſhall produce, clear after all charges, ſufficient to to pay every creditor under the ſaid commiſſion, 15 *s.* in the pound for their reſpective debts. Under this act he inſiſted that the judgment and writ of execution were irregular: ſince none of the effects of the Defendant would be liable to ſatisfy the Plaintiff's debt, if the eſtate had produced 15 *s.* in the pound; and at all events the tools of trade furniture and clothes were exempt; that the judgment therefore ought to have been entered ſpecially with reference to theſe exceptions, for which purpoſe the Plaintiff ſhould have ſued out a *ſcire facias*, averring that the eſtate had not produced 15 *s.* in the pound. He cited *Buxton* v. *Mardin*, 1 *T. R.* 80. in which a general judgment having been entered up after the Defendant's diſcharge under an inſolvent act, upon a warrant of attorney given before, the Plaintiff ſued out a ſpecial writ of execution, referring to the exceptions contained in the act; and Lord *Mansfield* ſaid, "It is clear the judgment is wrong, as it cannot be entered up generally ſince the act, without giving the Defendant an opportunity of pleading in diſcharge of his perſon;" and *Buller* J. ſaid, "The ſtatute has given a defence as to his perſon and wearing apparel, *&c.*, and that muſt be put upon record before judgment." He alſo cited *Gill* v. *Scrivens*, 7 *T. R.* 27. where the Plaintiff having entered up a judgment againſt the Defendant and taken his body in execution after one bankruptcy, the Defendant was diſcharged by a certificate under a ſecond bankruptcy, whereupon the Plaintiff ſued out a *ſcire facias* to have execution againſt his goods, which was held bad upon demurrer for want of a ſufficient averment that the eſtate had not produced 15 *s.* in the pound.

Shepherd Serjt., againſt the rule, inſiſted that as the judgment had purſued the warrant, and the execution had purſued the judgment, they were both regular. He admitted that in *Buxton* v. *Mardin* the proceedings were irregular, becauſe the execution had not purſued the judgment, for a general judgment will not warrant a ſpecial writ of execution: that in *Gill* v. *Scrivens* ſome *ſcire facias* was neceſſary, ſince the judgment, being more than a a year old, it could not be revived without a *ſcire facias*; and as the judgment was entered up and the body taken in execution between the two bankruptcies, the Plaintiff could not have execution againſt the goods, without ſtating thoſe circumſtances which deprived the Defendant of the benefit of his certificate, and therefore he was

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bound to ſtate the exception, which was contained in the ſame clauſe with that under which he claimed. But he urged that in the preſent caſe no *ſcire facias* was neceſſary to authoriſe either the judgment or execution.

Lord ALVANLEY Ch. J. The Defendant in this caſe complains of a judgment which is regular upon the face of it: but he alleges, that from ſome circumſtances which do not appear upon the record, the Plaintiff is not entitled to execution except under certain reſtrictions and limitations. The warrant of attorney is in the common form, authorizing the party to confeſs a general judgment: and the act of Parliament does not require that under theſe circumſtances any ſpecial judgment ſhould be entered. The Defendant therefore, ought to ſhew that he has been injured by an execution executed. If he could ſhew that his eſtate had produced 15*s.* in the pound, or that his tools, furniture, or clothes had been taken, the Court would grant relief; but the proof of theſe matters lies on him. In the caſe of *Gill* v. *Scrivens* the Defendant's perſon had been diſcharged, and it became neceſſary to ſue out a ſpecial execution under the act of Parliament, which could not be obtained without a *ſcire facias* ſtating all the circumſtances, which would bring the Defendant within the act, and negativing all exceptions contained in the enacting clauſe. But I do not know that the Plaintiff would be bound to prove that negative (*a*).

HEATH J. Little reliance can be placed on the caſe of *Buxton* v. *Mardin*, when we obſerve that it concludes with a recommendation from the Court to the Defendant not to object to the mode of proceeding which had been ſuggeſted. The queſtion in this caſe is, Whether the evidence ſtated on the Defendant's affidavit would have been ſufficient to have entitled him to an *auditâ querelâ?* A ſpecial judgment would not have been authorized by the warrant of attorney. The complaint muſt therefore be, that the

(*a*) This ſeems alſo to have been the opinion of Mr. Juſtice *Buller* and Mr. Juſtice *Heath*. See *Jelfs* v. *Ballard*, *ante*, vol 1. p. 468. 469. That was an action of *aſſumpſit*, to which the bankruptcy and certificate of the Defendant were pleaded, and it appearing that the Defendant had been twice a bankrupt, and that the cauſe of action occurred between the firſt and ſecond bankruptcy, the Court inclined to hold it unneceſſary for the Plaintiff to ſhew that the Defendant's eſtate would not produce 15*s.* in the pound under the ſecond bankruptcy, although the action was commenced before any dividend had been made, and before the period allowed by 5 *Geo.* 2. *c.* 30. *ſ.* 37. for making the dividend had elapſed.

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writ of execution ought to have been limited. It is not ſuggeſted that the execution has been improperly executed, or that more has been taken than might have been taken under a ſpecial execution. Now it appears to me that the *gravamen* in an *auditâ querelâ* muſt have been that ſomething had been improperly taken. And if relief could not have been granted on an *auditâ querelâ*, neither can it on motion.

ROOKE J. The judgment in this caſe purſues the warrant of attorney, and the execution purſues the judgment. Both therefore appear to me to be correct. The only ground of application to the Court muſt be, that the execution has been executed contrary to the 5 *Geo.* 2. But it appears that no dividend has been made: then how can the Defendant be entitled to ſet the execution aſide. It is not pretended that any of the articles protected by the ſtatute have been taken: had any ſuch matter appeared, it might have afforded ground for particular relief.

CHAMBRE J. I do not ſee how the Plaintiff could have acted otherwiſe than he has done. On a general warrant of attorney he could only enter up a general judgment. No one ever heard of a *ſcire facias* upon a warrant of attorney. Then the execution muſt follow the judgment. It was agreed by the Court of King's Bench in *Buxton* v. *Mardin*, that a ſpecial execution on a general judgment was bad. If the Plaintiff takes more under the execution than he is entitled to, the Defendant muſt make a ſpecial application on ſpecial grounds, the proof of which muſt lie on him. I do not think this deciſion inconſiſtent with the caſe of *Buxton* v. *Mardin*.

Rule diſcharged.

July 7th.

SALTE and Others, Aſſignees of STOCK a Bankrupt, *v.* THOMAS.

The priſon-books of the *Fleet* and *King's Bench* priſons, tho' admiſſible evidence to prove the period of the commitment and diſcharge of a priſoner, are not admiſſible to prove the cauſe of his commitment.

THIS was an action by the Plaintiffs, as aſſignees, upon two bills of exchange drawn by the bankrupt and accepted by the Defendant. The cauſe was tried before *Chambre* J. at the *Guildhall* Sittings in this Term, when the Plaintiffs, in order to prove that the bankrupt had committed an act of bankruptcy by lying two

months

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months in prison for debt, produced the books of the *Fleet* and *King's Bench* prisons to establish that fact. These books contained entries of the dates of the commitments and discharges of all the prisoners, together with particulars of the causes of each commitment extracted from the original warrants. From these books it appeared that the bankrupt had been committed to the *Fleet* for debt, and had been removed from thence to the *King's Bench* prison, charged as well with the action in the Common Pleas as with several other actions in the King's Bench, and that he had altogether lain in prison above two months. On the part of the Defendant it was objected that though the prison-books were admissible in evidence to prove the period of the commitment and discharge, yet they were not admissible to prove the cause of the commitment, but that the original warrants should have been produced. The learned Judge admitted the evidence, reserving the point, and a verdict was found for the Plaintiffs.

Bayley Serjt. having on a former day obtained a rule *nisi* for setting aside the verdict and having a new trial,

Shepherd and *Best* Serjts. shewed cause, and contended that as it appeared from the case of *The King* v. *Aickles*, *Leach. C. C.* 435. ed. 3. that the daily books of a prison are admissible to prove the time at which a prisoner is discharged, it must necessarily follow that if they are admissible to prove any of the facts which they contain, they are admissible to prove all the facts which they contain; for that the admissibility of the books did not depend upon the question, Whether better evidence of the facts contained in them might or might not be produced, since the parole evidence of the turnkey would be better evidence of the period of the commitment and discharge than the books themselves, but on the ground that the books were documents of sufficient credit to establish their contents.

Marshall (*a*) Serjt., in support of the rule, insisted that the case of *The King* v. *Aickles* only decided that the books of a prison are admissible to shew the time of the prisoner's commitment and discharge, and that the general rule of law being that the best evidence of a fact must be produced, the Court would not hold abstracts of the warrants of commitment, introduced into the public documents of the prison, as to the time of commitment and discharge, to

(*a*) In the absence of Mr. Serjt. *Bayley*.

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be thereby made as good evidence as the warrants of commitment themſelves; for ſuch a deciſion would be making a copy of an inſtrument taken by a public officer evidence, when if taken by a private individual it would clearly not be evidence.

Cur. adv. vult.

The opinion of the Court was now delivered by

Lord ALVANLEY Ch. J. The queſtion in this caſe is, Whether the evidence produced was ſufficient to prove a fact neceſſary to conſtitute the act of bankruptcy, *viz.* that the bankrupt had lain two months in priſon on civil proceſs for debt. For this purpoſe the priſon books were produced, from which it appeared that the bankrupt had lain the neceſſary time in priſon; but it was objected, that though the books were evidence of the time of the bankrupt's impriſonment, they were not evidence of the cauſe of the commitment, and that they were not equivalent to the *committitur* itſelf, which was admitted to be in exiſtence. To eſtabliſh the ſufficiency of the evidence the caſe of The King v. *Aickles* was cited, by which it appeared that in a criminal caſe, where it was material to prove the particular time of a priſoner's diſcharge, the book of *Newgate* was held to be ſufficient for that purpoſe. That was a book kept by a public officer for the purpoſe of entering the tranſactions of the priſon, the names of the priſoners, and the times of their diſcharge, which entries were ſometimes made from the information of the turnkeys and ſometimes from their indorſements on the warrants. The book was a complete hiſtory of the tranſactions of the priſon, and as ſuch it was held to be evidence of the day on which the priſoner was diſcharged. But the material diſtinction between that caſe and the preſent is, that there was no document of the fact which was proved by the book of *Newgate* but the book itſelf, and no other evidence could have been reſorted to except the parole teſtimony of the turnkey who might happen to be in the priſon at the time of the priſoner's diſcharge. But in the preſent caſe the *committitur* from which the entry was inſerted in the book is in exiſtence, and the queſtion is, Whether that be not better evidence than the book itſelf? I am of opinion, and my Brothers concur with me in thinking that it was better evidence, and that the books therefore ought not to have been admitted. It has been ſaid that theſe were in the nature of public books; but it was not contended, that they were that ſort of public document, a copy of which might be given in evidence, like a pariſh regiſter

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made under public authority. The two documents do not therefore appear to me of a ſimilar nature, for the gaoler is not required by law to keep theſe priſon books, but they are only kept for his own information and ſecurity. We do not therefore think this caſe governed by the caſe of *The King* v. *Aickles*; but we are of opinion that the *committitur* ought to have been produced to eſtabliſh the cauſe of the commitment, and conſequently that there muſt be a new trial.

Rule abſolute.

FURTADO *v.* RODGERS.

July 7th.

An inſurance effected in *Great Britain* on a *French* ſhip previous to the commencement of hoſtilities between *Great Britain* and *France* does not cover a loſs by *Britiſh* capture.

ASSUMPSIT on a policy of inſurance.

The declaration, after ſetting out a policy of inſurance in the uſual form, dated the 19th of *October* 1792, on the ſhip *Petronelli*, "at and from *Bayonne* to *Martinique*, and at and from thence to return to *Bayonne*," and making all the neceſſary averments, ſtated the loſs in theſe words: "And the ſaid *Joſeph Furtado* further ſays, that afterwards and after the ſaid ſhip had ſo arrived at *Martinique* aforeſaid, in the ſaid writing or policy of aſſurance mentioned, and whilſt ſhe remained there and before her departure from thence, in further proſecution of her ſaid voyage, to return to *Bayonne* aforeſaid, to wit, on the 12th day of *November*, in the year of our Lord 1793, the ſaid iſland of *Martinique* was, with force and arms, and in an hoſtile manner, attacked, captured, and taken by the forces of our preſent Sovereign Lord the now King, then being at enmity and open war with the ſaid iſland and the perſons exerciſing the powers of government in the ſame; and the ſaid ſhip then and there being at the ſame iſland as aforeſaid, then and there on the capture of the ſame, was then and there ſeized, taken, and captured by the ſaid forces of our ſaid Lord the King, as a prize, and thereby the ſame ſhip, with all her tackle, apparel, ordnance, munition, boat, and other furniture thereof, became and was totally loſt to the ſaid *Joſeph Furtado*, to wit, at *London* aforeſaid, in the pariſh and ward aforeſaid." The Defendant having pleaded the general iſſue, the cauſe was tried before Lord *Alvanley* Ch. J. at the firſt ſittings in this term, when a verdict was found for the Plaintiff, ſubject to the opinion of the Court upon the following caſe.

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The Plaintiff was owner of the ſhip at the time of the inſurance, and from thence until the time of the loſs hereinafter mentioned. The ſhip ſailed upon the voyage inſured in *October* 1792, and arrived at *Martinique* in *November* following; ſhe remained there until *March* 1794, but her remaining there was juſtified by neceſſity; and war having broken out between this kingdom and *France*, ſhe was then, upon the capture of the iſland of *Martinique* by the *Britiſh* forces, taken by them as a prize, with 40 other *French* veſſels. The Plaintiff at the time the policy was effected, and from thence until the action was commenced, was a *French* ſubject, and reſident at *Bayonne*, in *France*, which country was in amity with *Great Britain* when the policy was effected, and until the month of *February* 1793, at which time hoſtilities commenced between *England* and *France*. On the 10th *March* 1796, his Majeſty granted a licence to Meſſrs. *Alves*, *Rebello*, and Co. authorizing them to receive from the underwriters on this policy the money for which they had ſubſcribed, and this action was brought under directions from Meſſrs. *Alves*, *Rebello*, and Co. the Plaintiff's agents.

The queſtion for the opinion of the Court was, Whether the Plaintiff was entitled to recover in this action? If the Court ſhould be of opinion that he was, a verdict was to be entered for the Plaintiff; and the Court ſhould think that the objection to the Plaintiff's recovery appeared upon the declaration, ſo as to entitle the Defendant to the full benefit of it upon a motion in arreſt of judgment, the verdict was to be entered for the Plaintiff, and the Defendant was to make ſuch application; but if the Court ſhould be of opinion that the Plaintiff was not entitled to recover, and that the objection did not appear upon the record ſo as to entitle the Defendant to ſuch benefit, then a nonſuit was to be entered.

Bayley, Serjt., for the Plaintiff. The queſtion is, Whether after the ceſſation of hoſtilities between *England* and *France*, a *Frenchman* be entitled to recover in the *Engliſh* Courts upon a policy of inſurance effected in *England* before the commencement of hoſtilities for a loſs by *Britiſh* capture during the war? 1ſt, The authorities are deciſive in the Plaintiff's favour. In *Planche* v. *Fletcher*, *Doug.* 251. the policy, which was on *French* account, was ſubſcribed on the 7th of *July* 1778, and the proclamation for repriſals on the *French* was dated the 29th of the ſame month, after which the ſhip was captured by a King's cutter: Lord *Mansfield* ſaid, "It is indifferent whether the goods were *Engliſh* or *French*; the riſk extends

tends to all captures." The cases of *Eden* v. *Parkinson*, *Doug.* 732., and *Bermon* v. *Woodbridge*, *Doug.* 781., and *Plantamour* v. *Staples*, 1 *T. R.* 611. *in notis*, which also occurred in the time of Lord *Mansfield*, were of the same nature, and the Plaintiffs were allowed to recover. To these may be added the case of *Tyson* v. *Gurney*, 3 *T. R.* 477., which arose in the time of Lord *Kenyon*. That was an insurance by *American* loyalists effected on a *Dutch* ship before the commencement of hostilities between *Great Britain* and *Holland*; the loss accrued by *British* capture; and the Plaintiff recovered. These cases include a period of twelve years from 1778 to 1790: and though it does not appear that the objection now made was expressly raised, yet as all the cases afforded ground for the objection, it must be presumed to have been the understanding of the profession that such an objection could not have been made with success. After such a series of decisions countenancing these insurances, it may be questioned how far it would be consistent with good faith to foreigners to declare them to be illegal. Certainly it is not consistent with good policy to come to a decision which must have the effect of driving all foreign insurances from this country, since no foreigner will think it safe to effect an insurance here, when he knows that in the event of a war breaking out between this country and his own, his insurance will be rendered unavailable. The cases of *Brandon* v. *Nesbitt*, 6 *T. R.* 23., and *Bristow* v. *Towers*, 6 *T. R.* 35., having been determined on the ground of alienage, can afford no assistance to this Defendant: but as it appeared in the latter that the loss was occasioned by *British* capture, and the Court did not decide it at all upon that ground, it affords an additional reason for supposing, that even at that time it was not thought a sufficient objection. The case of *Potts* v. *Bell*, 8 *T. R.* 548. will not affect the present question; the insurance there having been effected on a trading with the enemy, which being illegal itself renders the insurance illegal also; though if such trading be sanctioned by the King's licence, the insurance will be legalized. *Vandyck* v. *Whitmore*, 1 *East*, 475. Many authorities therefore may be cited in the Plaintiff's favour, and none are to be found against him. But 2dly, It will be contended that it is contrary to sound policy to allow insurances by which the enemy may be indemnified against the acts of the *British* Government at the expence of *British* subjects. To this it may be answered that during the continuance of the war the foreigner can derive no benefit from his contract. So long as his

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recovering would tend to defeat the objects of the *Britiſh* Government, by ſupplying the coffers or encouraging the commerce of its enemies, he is diſabled from maintaining an action by his character of alien enemy. Nor can he calculate with any certainty upon recovering at the reſtoration of peace, ſo as to found any commercial ſpeculations upon ſuch expectation. For by the law of *England*, all the property of alien enemies, including their debts, is veſted in the crown: and upon office found the King is entitled to reap the benefit of all contracts made for their advantage. The *Attorney General* v. *Weedon*, *Parker Rep.* 267. After the ceſſation of hoſtilities therefore the foreigner will not be able to avail himſelf of his indemnity, unleſs the Crown neglect to inſiſt upon its rights: in which caſe it muſt be preſumed that his recovering is not inconſiſtent with the policy of the ſtate, in the ſame manner as that preſumption authorizes an alien enemy to recover even during the war, where he has obtained the King's licence for that purpoſe. It may be remarked that in the 13 *Geo.* 2. (*a*) an attempt was made to introduce an act of Parliament to prohibit inſurances on enemies' property without ſucceſs. An act however to this effect paſſed in the 21 *Geo.* 2. (*b*), and another in the 33 *Geo.* 3. (*c*); both which were temporary acts impoſing penalties and enacting that ſuch inſurances ſhould be void. Had they been void at common law, ſuch enactments would have been ſuperfluous; at leaſt a declaratory clauſe might have been ſufficient.

Beſt Serjt. for the Defendant. With reſpect to the caſes which have been cited it may be ſufficient to obſerve, that the queſtion which now ſtands for the determination of the Court, did not ariſe in any of them. Indeed it was then pretty generally underſtood that the property of an enemy might be inſured *flagrante bello*: conſequently no diſpute could have ariſen upon a policy like the preſent. It is a general principle of law that whatever militates againſt the intereſt of the ſtate is contrary to law; the law being made for the protection of the public. No contract therefore, which is prejudicial to morals, to the revenue, or to any civil eſtabliſhment can be enforced in a court of juſtice. Upon the ſame principle the law will not lend its aid to a contract which gives to one of the contracting parties an intereſt contrary to the intereſt of the ſtate. In *Foſter* v. *Thackeray*, 1 *T. R.* 57. *in notis*, an action was brought on a wager that war would be declared

(*a*) See 6 *T. R.* 42. (*b*) *C.* 4. (*c*) *C.* 27. *S.* 4.

with *France* in three months; and though the caſe was never finally decided, yet it appears from the expreſſions of Mr. Juſtice *Buller* in *Good* v. *Elliott*, 3 *T. R.* 701. 702. that a great majority of the Judges were againſt the action, and he conſiders it as a caſe of great authority. And in a caſe ſubſequent to *Foſter* v. *Thackeray*, *viz.* *Atherfold* v. *Beard*, 2 *T. R.* 610. the Court refuſed to enforce a wager reſpecting the amount of the hop duties, conſidering it contrary to the policy of the ſtate to admit the public diſcuſſion of the ſubject to which the wages related. And it ſeems to have been the opinion of all the Judges in *Good* v. *Elliott*, 3 *T. R.* 693. that wagers which are againſt the ſound policy of the kingdom, and tend to make the party a bad ſubject are void. Poſſibly the inſurance of enemies' property during war, in a commercial view may be advantageous, but in a political view it is highly dangerous. It has been ſuppoſed however, that information has been obtained for government through the medium of *Lloyd*'s Coffee-Houſe: but it ſeems rather too much to expect that thoſe who are moſt intereſted in the ſecurity of the enemy's ſhips ſhould be very ready to give information through which they may be deſtroyed. The intereſt of the underwriters certainly leads them to give information to the enemy of the deſtination of our own cruiſers, and whether they may at any time have been induced to do ſo, it is at leaſt contrary to all ſound policy to ſuffer the inducement to exiſt. The effect of ſuch policies of inſurance is to defeat the great objects of war. For in proportion to the exertions of the country will be the loſs ſuſtained by the enemy: and yet if enemies' property be inſured here, thoſe exertions of the government will be directed againſt its own ſubjects. One object of war is to deſtroy the commerce of the enemy; but the end of all inſurance is to encourage commercial ſpeculations by diſtributing the loſſes among a number of individuals. Theſe objections to a policy effected during war are equally applicable to one effected before the war. It often happens that previous to the commencement of hoſtilities, the firſt act of the government is to ſeize the foreign veſſels then in its own port. But if that property be inſured here, the ſeizure will neither diſtreſs the foreigner, nor afford any ſecurity to our own government againſt the acts of foreigners in whoſe ports our ſhips may happen to be. It is true that the policy in queſtion was lawful at the time when it was effected. But if it be illegal for an *Engliſhman* to inſure againſt the hoſtile acts of the

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Britiſh government, thoſe acts are not to be conſidered as falling within the riſks deſcribed in the policy. It is not to be intended that the Defendant contracted to do that which it was unlawful for him to do. Indeed admitting the contract to have been lawful at the time when it was made, and to have extended generally to all detentions of princes and people, the ſubſequent conduct of the *Britiſh* government diſpenſes with the performance of that part of it which relates to the hoſtile acts of that government. In *Brewſter* v. *Kitchell*, 1 *Salk.* 198. it is ſaid by *Holt* Ch. J. that "if a man covenant to do a thing which is lawful, and an act of parliament comes and hinders him from doing it, the covenant is repealed;" now it is as much competent to the King to declare war as it is to the parliament to make a ſtatute; and if the commencement of war render it illegal to indemnify the foreigner againſt the hoſtile acts of the *Britiſh* government, that part of the contract is as much repealed as if an act of parliament had paſſed for that purpoſe. It is ſaid that the enemy can receive no indemnity until the reſtoration of peace. Yet he may ſpeculate during the war upon the certainty of receiving his indemnity at a future period: and though it is ſaid that the King may ſue for the debt, and thus deſtroy his expectation, it is much too improbable that ſuch a prerogative would ever be reſorted to, for the Court to found any argument upon it; and indeed the difficulty of enforcing that prerogative, from the defect of the neceſſary evidence (of which the greateſt part would be in the enemy's poſſeſſion) would render it almoſt wholly unavailing.

Cur. adv. vult.

The opinion of the Court was now delivered by

Lord ALVANLEY Ch. J. As it is of infinite importance to the parties that this caſe ſhould be decided as ſpeedily as poſſible, and as we entertain no doubts upon the ſubject, we think it right to deliver the judgment of the Court without any further delay: at the ſame time conſidering the magnitude of the queſtion, we ſhall allow the parties to convert this caſe into a ſpecial verdict, in order that the opinion of the higheſt Court in this kingdom may be taken, if it ſhould be thought neceſſary. There are two queſtions for our conſideration; 1ſt, Whether it be lawful for a *Britiſh* ſubject to inſure an enemy from the effect of capture made by his own government? 2dly, Whether, if that be illegal, the inſurance in this caſe having been made previous to the commencement of hoſtili-

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ties will make any difference? As to the 1ſt point, it has been underſtood for ſome years paſt to have been the opinion of all *Weſtminſter-Hall*, and I believe of the nation at large, that ſuch inſurances are not ſtrictly legal or capable of being enforced in a court of juſtice. The caſes upon the ſubject are all brought into a ſmall compaſs in the two valuable books of Mr. *Park* and my Brother *Marſhall*. Mr. *Park* ſeems to conſider the caſes of *Brandon* v. *Neſbitt* and *Briſtow* v. *Towers* as having decided the point (*a*); but after looking very accurately into all the caſes, I am ready to admit that there is no direct determination. The above two caſes proceeded on the ſhort ground of alienage, which was ſufficient to ſupport the deciſion of the Court without entering into the other queſtion; and I do not think the latter words of Lord *Kenyon* in *Brandon* v. *Neſbitt*, applied as they are to the caſe of *Ricord* v. *Bettingham*, ſupport the inference which has been drawn by my Brother *Marſhall* (*b*) in his book, *viz.* that his Lordſhip thought that a policy effected previous to the war might be ſued upon in the event of peace, even though the loſs ſuſtained by the aſſured aroſe from *Britiſh* capture. It is well known that for a conſiderable time, not only ſome politicians entertained an opinion that inſurances on enemy's property were beneficial, but that a great Judge went ſo far as to try cauſes in which this point directly appeared, and permitted foreigners in their own names, and for their own benefit, during the war, to recover on policies of inſurance on foreign goods againſt *Britiſh* capture. The opinion of that learned Judge, as to the policy of ſuch inſurances, is well known, and it was ſuppoſed he would not have ſanctioned them unleſs his opinion in point of law had been equally favourable. But we have now the beſt evidence (*c*) that his ſentiments in that reſpect were different from what they were ſuppoſed to be. Though he did try cauſes upon ſuch inſurances, he always entertained doubts upon the law, and endeavoured to keep out of ſight a queſtion which might oblige him to decide againſt what he thought for the benefit of the country. This takes off materially from the effect of thoſe caſes which have been cited, to induce a ſuppoſition that the law of *England* had tolerated ſuch inſurances. How far it is conſiſtent with good faith, after ſo long an acquieſcence, to ſet up a defence which the foreigner may ſay he had no reaſon to expect, is a queſ-

(*a*) See *Park's Inſur.* p. 14. 240.
(*b*) See *Marſhall on the Law of Inſurance*, p. 37. 600.
(*c*) See what is ſaid by *Buller* J. *ante*, vol. 1. p. 354.

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tion for the decision of Defendant and not that of the Court. We can only say, that although many persons have recovered in such actions, it is equally true that doubts have been entertained by many persons as to their right to recover, and that most of those who were informed upon the subject were firmly persuaded that the objection might have been made with success. This affords a sufficient vindication to the courts of this country in now deciding this point against a foreigner. In the year 1748 an act (*a*) passed prohibiting the insurance of *French* ships and goods during the war; this was at least a legislative declaration of the impolicy of such insurances at that time. From the expiration of that act to the passing of the 33 *Geo.* 3. *c.* 27. *s.* 4. no legislative interference upon the subject ever took place, and previous to the last mentioned act the policy in question was effected. By the terms of the policy the underwriters certainly undertake to indemnify the Plaintiff against all captures and detentions of princes, without any exception in respect of the acts of the government of their own nation. The question then is, Whether the law does not make that exception, and whether it be competent to an *English* underwriter to indemnify persons who may be engaged in war with his own sovereign against the consequences of that war? We are all of opinion that on the principles of the *English* law it is not competent to any subject to enter into a contract to do any thing which may be detrimental to the interests of his own country; and that such a contract is as much prohibited as if it had been expressly forbidden by act of parliament. It is admitted that if a man contract to do a thing which is afterwards prohibited by act of parliament, he is not bound by his contract. This was expressly laid down in *Brewster* v. *Kitchell*, 1 *Salk.* 198. And on the same principle, where hostilities commence between the country of the underwriter and the assured, the former is forbidden to fulfil his contract. With respect to the expediency of these insurances, it seems only necessary to cite a single line from *Bynkershoek* (*b*), and part of a passage in *Valin* (*c*). The former says, "*Hostium pericula in se suscipere quid est aliud quam eorum commercia maritima promovere*," and the latter, speaking of the conduct of the *English* during the war of 1756, who permitted these insurances, says, "The consequence was, that one part of that nation restored to us by the effect of insu-

(*a*) 21 *Geo.* 2. *c.* 4.

(*b*) *Quæst. Juris Pub. lib.* 1. *c.* 21. *Marshall.* p. 31.

(*c*) P. 32. *Marshall.* p. 32.

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"rance, what the other took from us by the rights of war." Lord *Hardwicke* indeed, in *Henckle* v. The Royal Exchange Assurance Company, 1 *Ves.* 320. uſes theſe words: "No determination has been that inſurance on enemies' ſhips during the war is unlawful; it might be going too far to ſay all trading with enemies is unlawful, for that general doctrine would go a great way, even where only *Engliſh* goods are exported, and none of the enemies' imported, which may be very beneficial. I do not go on a foundation of that kind, and there have been ſeveral inſurances of this ſort during the war which a determination upon that point might hurt." This however is but a doubtful opinion as to the legality of ſuch inſurances, and not very favourable to them. In *Planche* v. *Fletcher* Lord *Manſfield* is certainly reported to have ſaid, "it is indifferent whether the goods were *Engliſh* or *French*, the riſk inſured extends to all captures," which ſeems at firſt to go a great way towards giving effect to inſurances againſt *Britiſh* capture. But we muſt ſuppoſe this to have been ſaid becauſe the Defendant did not preſs the objection; and if the party acquieſced, the expreſſion gives no more weight to the caſe than belongs to any of the other caſes which have been cited, ſuch as *Bermon* v. *Woodbridge*, *Eden* v. *Parkinſon*, and *Tyſon* v. *Gurney*, in which the queſtion was not raiſed at all. On the other hand the caſes of *Brandon* v. *Neſbitt* and *Briſtow* v. *Towers* certainly proceeded on the ground of alienage. There is no expreſs declaration therefore of the court of King's Bench, either for or againſt the legality of ſuch inſurances, and the queſtion comes now to be decided for the firſt time. We are all of opinion that to inſure enemies' property was at common law illegal, for the reaſons given by the two foreign juriſts to whom I have referred. If this be ſo, a contract of this kind entered into previous to the commencement of hoſtilities muſt be equally unavailable in a court of law, ſince it is equally injurious to the intereſts of the country; for if ſuch a contract could be ſupported, a foreigner might inſure previous to the war againſt all the evils incident to war. But it is ſaid that the action is ſuſpended, and that the indemnity comes ſo late that it does not ſtrengthen the reſources of the enemy during the war. The enemy however is very little injured by captures for which he is ſure at ſome period or other to be repaid by the underwriter. Since the caſe of *Bell* v. *Potts*, it has been univerſally underſtood that all commercial intercourſe with the enemy is to be conſidered as ille-

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gal at common law (though previous to that case a very learned Judge (*a*) appears to have entertained doubts on that subject) and that consequently all insurances founded upon such intercourse are also illegal. Why are they illegal? Because they are in contravention of his Majesty's object in making war, which is by the capture of the enemies' property, and by the prohibition of any beneficial intercourse between them and his own subjects to cripple their commerce. The same reasoning which influenced the Court of King's Bench in their decision in *Bell* v. *Potts*, seems decisive in the present case. For it being determined that during war all commercial intercourse with the enemy is illegal at common law, it follows that whatever contract tends to protect the enemy's property from the calamities of war, though effected antecedent to the war, is nevertheless illegal. It has been supposed that the doctrine which has prevailed respecting ransom bills tends to favour these insurances; but no action was ever maintained upon a ransom bill in a court of common law until the case of *Ricord* v. *Bettenham* (*b*), and I have the authority of Sir *William Scott* for saying, that in the Admiralty Court the suit was always instituted by the hostage. The case of *Ricord* v. *Bettenham* however, certainly tended to shew that such an action might be maintained in the courts of common law at the suit of an alien enemy. In consequence of this a similar action was brought in *Cornu* v. *Blackburn* (*c*), and after argument the court of King's Bench held that it might be sustained. But in *Anthon* v. *Fisher* (*d*), the contrary was expressly determined upon a writ of error in the Exchequer Chamber. I forbear to enter into the argument suggested at the bar in favour of the Defendant, that the law will not enforce a contract founded on a transaction detrimental to the public policy of the state. The ground upon which we decide this case is, that when a *British* subject insures against captures, the law infers that the contract contains an exception of captures made by the government of his own country; and that if he had expressly insured against *British* capture, such a contract would be abrogated by the law of *England*. With respect to the argument insisted upon by way of answer to the public inconvenience likely to arise from permitting such contracts to be enforced, *viz.* that all contracts made

(*a*) Mr. Justice *Buller* in *Bell* v. *Gilson*, *ante*, vol. 1. p. 345.

(*b*) 3 *Bur.* 1734. 1 *Bl.* 563.

(*c*) *Doug.* 641.

(*d*) *Doug.* 649, 650. *in notis.*

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with an enemy enure to the benefit of the King during war, and that he may enforce payment of any debt due to an alien enemy from any of his ſubjects, we think it is not entitled to much weight. Such a courſe of proceeding never has been adopted; nor is it very probable that it ever will be adopted, as well from the difficulties attending it, as the diſinclination to put in force ſuch a prerogative. The Plaintiff, I am ſorry to ſay, is not entitled to a return of premium, becauſe the contract was legal at the time the riſk commenced, and was a good inſurance againſt all other loſſes but that ariſing from capture by the forces of *Great Britain*.

Judgment for the Defendant.

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Policy of inſurance on a ſhip warranted *American*. To negative this warranty a ſentence of condemnation of a *French* court at *St. Domingo* was given in evidence, which began thus: "Condemnation of the *Engliſh* ſhip *Mount Vernon*. Extract from the books of the office of the proviſional tribunal reſpecting prizes eſtabliſhed at *St. Domingo*. We *F. P.* Judge," *&c.* and after ſtating that the circumſtances of papers having been thrown

THIS was an action on a policy of inſurance, dated the 18th of *June* 1796, on 25 hogſheads of ſugar, valued at 40*l. per* hogſhead, on board the *Mount Vernon*, "at and from *Philadelphia* to *London*, with liberty to touch at one port in the channel," the premium was three guineas *per cent.* the ſhip being ſtated in the policy to be an "*American* ſhip."

The cauſe was tried before Lord *Alvanley* Ch. J. at the ſittings after *Trinity* Term 1801, when the jury found a verdict for the Plaintiffs, damages 290*l.* 11*s.*, ſubject to the opinion of the court upon a caſe ſtating; that the *Mount Vernon* at the time the inſurance was effected, when the ſhip ſailed upon the voyage inſured, and when ſhe was afterwards captured, was the ſole property of *William Mayne Duncanſon*; that the ſaid *William Mayne Duncanſon* was born a *Britiſh* ſubject, under the allegiance of the King of *Great Britain*, had reſided in the United States of *America* ſince the 22d of *Auguſt* 1794, but at none of the above periods was naturalized, or by the laws of the *United States* entitled to be naturalized as an *American* citizen, but that he was entitled to be, and was in fact naturalized as ſuch in *October* 1796; that the *Mount Vernon* had formerly been the property of *Thomas Murgatroyd*, an *American* citizen, and that

overboard, the captain and ſupercargo having abandoned the ſhip, the captain being a *Portugueze* without a certificate of his naturalization, and the *United States*, in their laſt treaty with *England*, having ſuffered to be added to the articles which had before been conſidered as contraband of war, ſtaves, *&c.* were ſufficient motives to condemn the ſaid ſhip, condemned the ſame as property belonging to the captor. Held that this ſentence was concluſive evidence that the ſhip was not *American*.

Quere, Whether if a ſhip be warranted *American*, the aſſured does thereby undertake that ſhe ſhall be owned and navigated according to all the regulations of the *American* navigation act?

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the following are copies of the ship's register and certificate of registry, in the form in which they existed when the ship sailed upon the voyage insured; [Here was introduced the original register of the *Mount Vernon*, in the name of *Thomas Murgatroyd* owner, and *John Cox* master, with a subsequent indorsement, stating *George G. Dominick* to have taken the oath required by law, and to be master in lieu of *John Cox*.] that the destination of the ship was *Cowes* and a market, and that the Plaintiffs were to direct to what market she should go; that the property insured was on board at the time of the capture hereinafter mentioned, and the assured were interested therein to the amount of the sum insured; that the ship sailed on the 2d *June* 1796; that together with the usual documents taken out by *American* vessels, she had on board the following passport; [Here was introduced the triplicate pass, the translation from the *French* of which, as far as it respects the argument of this case, was as follows; "To all who shall see these "presents. Be it known that leave and permission has been "granted to *George G. Dominick*, master or commander of the ship "*Mount Vernon*, of the town of *Philadelphia*, of the burthen of "424 $\frac{17}{95}$ tons or thereabouts, being at present in the port of *Phila-* "*delphia* and bound for *Hamburgh* loaded with sundries *per* ma- "nifest," &c.] that two hours after the pilot had been discharged, and as soon as the ship had sailed out of the river *Delaware* she was boarded and taken possession of by the *Flying Fish*, an authorized cruiser of the Republic of *France*, and afterwards carried into the port of *St. John* in the *Spanish* island of *Porto Rico*; that whilst remaining there the ship and cargo were libelled by the captors in the provisional tribunal of prizes at *St. Domingo*, being a court of proper judicature established by the Republic of *France* for the determination of questions of prize; that in the above court a sentence was pronounced, the form of which is as follows: "Thirteenth *Fructidor* (the 30th of *August*, fourth year.) Condemnation of the *English* ship *Mount Vernon*. Extract from the books of the office of the provisional tribunal respecting prizes, established in *St Domingo*. We *Francis Pons*, Judge of the provisional tribunal respecting prize established in *St. Domingo*, having looked over our sentence of the seventh *Thermidor* last, where all the papers exhibited by citizen *Nadal*, captain of the privateer *Flier*, against the ship *Mount Vernon*, are duly noticed, through which we had submitted the decision of this prize to the civil commission of *Guarico*, which

applies again to our tribunal for pronouncing ſentence on this ſubject; having noticed alſo inſtructions which were officially given us by the citizen agent of the *French* Republic in this city, iſſued by the civil commiſſion aforeſaid, in whoſe archives they have been duly recorded, from which it appears firſt, that the papers having been thrown into the ſea by the captain in ſight of the privateer which captured him, ſecondly, that the captain and ſupercargo having precipitately abandoned their ſhip, in ſpite of the good treatment received by them from the *French* captain, and the hints he gave them about remaining there in order to plead their own cauſe, and thereby avoid her confiſcation, thirdly, the behaviour of the captured crew, fourthly, the captain being a *Portugueze* without a certificate of his naturalization, fifthly, that the *United States*, in the laſt treaty which they concluded with *England*, having ſuffered to be added to the articles which have been looked upon till at preſent as contraband of war, ſtaves, tackles, ſailcloth, iron hoops, and finally all which can be made uſe of for veſſels, are ſufficient motives to condemn ſaid ſhip; after a ſerious examination we have judged and do judge that the ſhip *Mount Vernon*, captain *George Dominico*, *Portugueze*, with her cargo, has been duly and juſtly captured by the *French* privateer commanded by citizen *Nadal*, to whom we adjudge her as property belonging to him, and of which he may diſpoſe under the clauſes and conditions made with his officers and crew, he being accountable for the duties of invalids and the coſts of the tribunal, which he ſhall pay to the bearer of our notary's order. *Santo Domingo*, *Fructidor* thirteenth (*Auguſt* thirtieth). Fourth year of the *French* Republic, one and indiviſible. Signed in the Regiſter, *Pons* Judge, and *Deſpujeaux* Notary Public.

(Signed) PONS Judge.
Deſpujeaux Notary.

That under this ſentence of condemnation the *Mount Vernon* and her cargo were delivered up to the captors by the *Spaniſh* governor of *Porto Rico* (*a*).

The

(*a*) At this part of the caſe were introduced ſeveral articles of the treaty between *France* and *America*, dated 6th *February* 1773, and alſo ſeveral paſſages from the *American* laws. Such as are material to the argument, are either ſtated at length or abridged.

Art. 12. of the treaty requires the ſhips of either party to exhibit, not only their paſſports, but certificates ſhewing that their cargo is not contraband.

Art. 25. "To the end that all manner of diſſenſions and quarrels may be avoided and prevented on one ſide and the other, it is

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The queſtion for the opinion of the Court was, Whether the Plaintiffs were entitled to recover?

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is agreed that in caſe either of the parties hereto ſhall be engaged in war, the ſhips and veſſels belonging to the ſubjects or people of the other ally muſt be furniſhed with ſea-letters or paſſports, expreſſing the name, property, and bulk of the ſhip, as alſo the name and place of habitation of the maſter or commander of the ſaid ſhip, that it may appear thereby that the ſhip really and truly belongs to the ſubjects of one of the parties, which paſſports ſhall be made out and granted according to the form annexed to this treaty, they ſhall likewiſe be recalled every year, that is, if the ſhip happens to return home in the ſpace of a year. It is likewiſe agreed, that ſuch ſhips being loaden, are to be provided not only with paſſports as above mentioned, but alſo with certificates containing the ſeveral particulars of the cargo, the place whence the ſhip ſailed, and whither ſhe is bound, that ſo it may be known whether any forbidden or contraband goods be on board the ſame, which certificate ſhall be made out by the officers of the place whence the ſhip ſet ſail, in the accuſtomed form; and if any one ſhall think fit or adviſeable to expreſs in the ſaid certificates the perſon to whom the goods on board belong he may freely do ſo."

Art. 27. regulates the mode of treatment to be obſerved towards the ſhips of the "ſubjects, people, or inhabitants," of either party when met with by ſhips of war or privateers, *viz.* that on production of their paſſports they ſhall be at liberty to purſue their voyage.

By the *American* navigation act the following proviſions are made: "That ſhips or veſſels which ſhall have been regiſtered by virtue of the act intituled, "An act for regiſtering and clearing veſſels, regulating the coaſting trade, and for other purpoſes," and thoſe which after the laſt day of *March* next ſhall be regiſtered purſuant to this act and no other (except ſuch as ſhall be duly qualified according to law for carrying on the coaſting trade and fiſheries, or one of them) ſhall be *denominated and deemed ſhips or veſſels of the* United States, *entitled to the benefits and privileges appertaining to ſuch ſhips or veſſels.* Provided that they ſhall not continue to enjoy the ſame longer than they ſhall continue to be wholly owned, and to be commanded by a citizen or citizens of the ſaid *United States*; that ſhips built within the *United States*, either before or after the 4th *July* 1776, and belonging to a citizen of the *States*, and ſhips not built within the *States*, but on the 16th *May* 1789, and from thenceforth belonging to a citizen, and ſhips captured and condemned as prize, or for a breach of any *American* law, may, if owned by a citizen, be regiſtered, but that no other ſhips may be regiſtered; that, in order to entitle any ſhip to a regiſtry, an oath muſt be made before the proper officer, ſtating the name and burthen of the ſhip, the place where and the time when ſhe was built, and in ſhort making it appear that according to the proviſions of the navigation act ſhe is entitled to be regiſtered, and that if any of the facts ſtated in ſuch affidavit are within the knowledge of the party making the affidavit falſe, the ſhip ſhall be forfeited; that every change in the commander of the ſhip ſhall be reported to the collector of the diſtrict where the ſame happens, or where the ſhip firſt arrives after ſuch change, on pain of forfeiture of the regiſtry, and the collector ſhall indorſe on the certificate of regiſtry the name of the new commander; that if a ſhip be regiſtered, and afterwards transferred by way of truſt to a ſubject of any foreign prince or ſtate, and ſuch tranſfer ſhall not be notified, ſuch ſhip ſhall be forfeited; that on the return of any regiſtered ſhip to the port where her owner, or any part owner reſides, ſuch owner or part owner ſhall make oath that the regiſter ſtill contains the names of all the perſons who are owners, ſpecifying any tranſfer that has been made ſince the regiſter was granted, and that no foreign ſubject has any ſhare: if the ſhip returns to a port where no owner or part owner reſides, then the commander ſhall make the like oath; if neither will make the affidavit, then the ſhip "ſhall not be entitled to the privileges of a ſhip or veſſel of the *United States*."

By the *American* naturalization act paſſed and approved 26th *March* 1790 it is provided

Bayley Serjt. for the Plaintiffs. Three points I underſtand are to be inſiſted on for the Defendant: 1ſt, That the warranty contained in the policy that the *Mount Vernon* was an *American* ſhip, has not been complied with, becauſe the owner of the *Mount Vernon* was not a naturalized *American* ſubject; 2dly, That the *Mount Vernon* was not navigated as an *American* ſhip ought to be, the *American* navigation act requiring the captain to be a citizen of the *United States*, whereas *G. G. Dominick* was a *Portugueze*; and 3dly, That the treaty between *America* and *France* has been infringed by the *Mount Vernon*, her paſſport not having truly deſcribed her intended voyage. Moſt clearly the *Mount Vernon* was not entitled to the peculiar municipal privileges conferred on ſhips belonging to naturalized ſubjects of the *United States*, her owner not being a naturalized ſubject. But the meaning of the warranty is not that ſhe was to be entitled to thoſe privileges, but that according to the law of nations and the treaties exiſting between *America* and other countries ſhe ſhould be an *American* ſhip; the riſk of the underwriters not being varied by the privileges to which ſhe is entitled in the ports of *America*, but by the treatment to which ſhe is entitled from the belligerent powers upon the high ſeas. The diſtinction between *Britiſh* built and *Britiſh* owned ſhips, between ſuch as acquire certain privileges in conſequence of their regiſtry, and ſuch as are merely owned by ſubjects of this country, is obvious. Could it however be contended for an inſtant, that a ſhip *Britiſh* owned, though not *Britiſh* built, would not fall within the meaning of a warranty that ſhe was *Britiſh*? Would not ſuch a ſhip ſail under the protection of the

vided, that any alien being a free white perſon, after two years' reſidence within the *United States*, may be admitted a citizen by any of the common law courts, on his ſatisfying ſuch court that he is a perſon of good character, and taking the neceſſary oaths.

By a ſubſequent act of naturalization, paſſed and approved the 29th of *January* 1795, the privilege of being naturalized is reſtricted to thoſe who declare upon oath before ſome of the courts there enumerated, their intention of applying to be naturalized at leaſt three years before the time of their admiſſion, and at the time of their application to be admitted to be naturalized declare upon oath before ſome one of the ſame courts, that they have reſided within the *United States* at leaſt three years, and within the ſtate or territory where the court is held to which they apply, one year at leaſt. But it is provided that perſons reſident in *America* at the time the above act was paſſed, may be naturalized if they declare upon oath that they have reſided two years within the *United States*, and one year within the ſtate or territory where the court to which they apply is ſitting.

The caſe alſo ſtated that either party ſhould be at liberty to refer to any part of the *American* laws, or the treaty of the 6th *February* 1778, between *France* and *America*, as if they had been fully ſtated.

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Britiſh flag and be entitled to the interference of the *Britiſh* government if improperly moleſted by any belligerent power? The ſame obſervation applies to the warranty of an *American* ſhip, and though the *Mount Vernon* would, as belonging to a perſon not naturalized in *America*, be obliged to pay higher duties in the ports of *America* than if ſhe had belonged to a naturalized ſubject of the *United States*, ſhe muſt nevertheleſs be deemed an *American* ſhip, and as ſuch be entitled to the ſame treatment from belligerent powers, and the ſame protection from the *American* government as any other ſhip belonging to a naturalized ſubject of the *United States*. The *American* regiſter act is founded on the ſame principle as the *Britiſh* regiſter act, and with a view to municipal regulations merely. The terms of the *American* navigation act are, that ſhips not regiſtered ſhall not "be denominated and deemed ſhips or "veſſels of the *United States*, entitled to the benefits and privileges "appertaining to ſuch ſhips or veſſels". The latter part of the ſentence ſufficiently explains the former, *viz.* that they ſhall not be deemed ſhips of the *United States*, with a view to particular privileges in the *United States*, though with a view to national privileges as againſt the reſt of the world they remain as before that act. This is further explained by the fact that ſhips of the *United States* pay a duty inwards of only ſix cents *per* ton, while ſhips not of the *United States* pay in ſome caſes ten, in ſome thirty cents *per* ton. In addition to which it may be obſerved, that by the *American* navigation act, if the property of a ſhip be altered ſhe muſt be regiſtered anew, otherwiſe the ſhip ſhall ceaſe to be deemed a veſſel of the *United States*, and alſo that if the change of the maſter be not reported the regiſter is void. Now ſuppoſe ſuch a ſhip built within the *United States*, and owned by a naturalized ſubject of the *United States*; would ſhe from the moment ſhe incurred the forfeiture of her regiſtry ceaſe to be an *American* ſhip, and entitled to the protection of the *American* government? Though ſhe ceaſes to be an *American* ſhip for certain purpoſes, it is moſt clear ſhe does not become a ſhip of any other nation. An *American* ſubject is only thus far diſtinguiſhable from an *American* citizen, that the latter is entitled to privileges which the former is not; but both are equally entitled to the protection of the *American* government. Had *America* been at war with *France*, and *Great Britain* at peace with her, the *Mount Vernon* would have been a ſubject of prize to

the cruisers of *France*, notwithstanding her owner was not a naturalized subject of the *United States*, and the *British* government could not have interfered in his favour, nor could she have been warranted *British*, for the domicile of her owner would have falsified such a warranty. The converse of the present case was decided by Lord *Kenyon* in the case of *Tabbs* v. *Bendelack* (*a*). Though part of the treaty between *America* and *France*, requires that a ship, in order to be deemed an *American* ship as between the two powers, shall be

(*a*) *Tabbs* v. *Bendelack*. Sittings after *Trinity* Term 1801. *coram* Lord *Kenyon* at *Guildhall*.

This was an action on a policy of insurance on the freight of the ship *Franklin*, warranted *American*, at and from *Liverpool* to *Naples* or *Sicily*, with leave to discharge at *Leghorn*. The policy was dated the 29th of *December* 1800. It appeared that the Plaintiff was an *American* born, had resided in *America*, and had been employed in navigating vessels between this country and *America*; that having married in *Liverpool*, he had, from the year 1797, occupied a house there, in which his wife and children resided; that since that time he had once or twice navigated a ship from *Liverpool* to *America*, and back again, but that during the last year he had never been out of *England*, but had employed others to navigate his vessels to *America* and elsewhere, his family constantly residing at *Liverpool*; that in *October* 1800, he had purchased the *Franklin*, which was an *American* ship, and regularly documented as such from her owner, who was an *American*, and had brought her over from *America*; and that when the voyage to which the policy related should be completed, the Plaintiff intended to return in her with his family to *America*. The action was brought in consequence of a loss by capture.

For the Defendant it was objected that the warranty had not been complied with, inasmuch as the Plaintiff was residing under and entitled to the protection of *Great Britain*, and had no right to set up his privileges as a citizen of *America* against the belligerent powers.

For the Plaintiff it was insisted that his residence here was merely temporary, that he had the *animus revertendi*, and was therefore entitled to warrant his ship *American*.

Lord *Kenyon* Ch. J. Whether the Plaintiff has the intention of returning to *America* or not at a future period cannot affect the present question. In the policy he has warranted the ship *Franklin* to be *American*; from which warranty, the underwriters collected that she was entitled to the privileges of an *American* ship. But whether the ship be entitled to those privileges or not does not depend merely upon her owner being an *American* born. Persons residing in this country, reaping the advantages of the trade of this country, and contributing to the well-being of this country, must for the purposes of trade be considered as belonging to this country. By the law of nations, therefore, the property of such a person is liable to capture by belligerents, on the ground of such property belonging to a subject of this country. That rule of law was acted upon in the *Saint Eustatia* cases at the Cockpit, when Lord *Camden*, and some of the greatest persons that ever adorned the law of this country presided there. In the case of the *Argonaut**, though we were of opinion that *Collet* being a native of this country, could not put off his allegiance to it, but might be guilty of high treason against the state, yet we thought that being domiciled in *America* he was entitled to the privileges of an *American*.—The Plaintiff was nonsuited.

The Attorney General (*Law*), *Erskine*, *Park*, and *Gaselee*, for the Plaintiff.

Garrow and *Gibbs* for the Defendant.

* *Wilson* v. *Marryatt*, 8 *T. R.* 31. also *ante*, vol. 1. p. 430.

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registered according to the provisions of the *American* navigation act, yet the question between the parties to this action must be decided by reference to the general law of nations, according to which the warranty that the *Mount Vernon* was *American*, has been complied with. As to the 2d objection, that the *Mount Vernon* was not navigated according to the laws of *America*, the captain being a *Portugueze*, whereas he ought to have been a citizen of the *United States*, both the fact and the conclusion drawn from that fact may be denied. The fact is collected from the sentence of condemnation; whereas that sentence only says that the captain was a *Portugueze* without a certificate of his naturalization. By the laws of the *United States*, previous to the act passed in 1795, any person who had resided in *America* for two years was entitled to be naturalized. Now the sentence does not allege that he was not a citizen of *America*, but merely that he had not about him at the time of the capture the evidence of his being a citizen. But the treaty between *America* and *France* does not require that a foreigner who has acquired citizenship in *America*, should carry about him the certificate of his naturalization; nor indeed, as between the two powers, is it necessary that the captain should be an *American* citizen, though in consequence of his not being so the ship is not entitled to the municipal privileges of a ship of the *United States*. [*Heath* J. By the 25th article of the treaty, the passport is to express the name and place of habitation of the master and commander of the ship. Now in the passport stated in the case, though the name of the master and commander is mentioned, his place of habitation does not seem to be stated; for the words, "of the town of *Philadelphia*," immediately follow the name of the ship, and seem descriptive of the port to which she belongs.] Both the terms and the spirit of the treaty are satisfied if any part of the passport express the place of habitation of the commander. Indeed the words "of the town of *Philadelphia*," clearly refer to the captain and not to the ship, for in the printed copy of the passport, the blank left for the name of the captain is not sufficiently large to introduce his place of habitation also, and then after the description of him as "master or commander," is left another blank, large enough for the introduction of the name of the ship and the place of the master's habitation. Nor does the treaty require that the particular port to which the ship belongs should be expressed. The Court therefore will rather apply the description to the master, such description

ſcription of him being neceſſary to be inſerted, than to the ſhip which need not be ſo deſcribed. Probably every paſſport which has been filled up ſince the treaty between *America* and *France* has been filled up in the ſame way as this, and therefore it ſhould rather be conſtrued by uſage than the nicety of a ſtrict grammarian. The 3d objection taken is, that the paſſport has not truly deſcribed the deſtination of the ſhip. It is neceſſary to obſerve, that by the treaty it is not required that the paſſport ſhould expreſs the place of deſtination, but that the certificate of clearance ſhould expreſs it. Now it is ſtated in the caſe that the *Mount Vernon* had "the uſual documents taken out by *American* ſhips;" it muſt be preſumed therefore that her certificate of clearance was regular. It is only incumbent on me to contend that the deſtination of the ſhip ſtated in the paſſport was introduced *bonâ fide*, and not with a view to miſlead the cruiſers of the belligerent powers. It happened that when the ſhip ſailed, part of her cargo was not admiſſible into the ports of *Great Britain*, and if that inadmiſſibility had continued to the time of her arrival at *Cowes*, *Hamburgh* would have been the market to which ſhe would have gone. At the time of her ſailing therefore her port of diſcharge was not decided upon, but was left to the diſcretion of the houſe of *Baring* and Co. Previous to her arrival at *Cowes*, an act of parliament had paſſed allowing the importation of the commodity before prohibited, provided an order of council could be obtained for that purpoſe; whereupon the houſe of *Baring* and Co. decided that *London* ſhould be her port of diſcharge. *Hamburgh* therefore being the moſt probable place of deſtination at the time ſhe ſailed on her voyage, that place was mentioned in the paſſport as her place of deſtination. The ſpirit of the treaty muſt be held only to require an *American* to ſtate the place of deſtination of the ſhip to the beſt of his knowledge and belief, or he would be excluded from ſailing upon any voyage with a cargo, the deſtination of which was not unalterably fixed. [Here he was proceeding to obſerve, that in the *French* copy of the treaty between *America* and *France*, in which language it was originally drawn, and which in caſe of diſpute was to bind, no mention was made of the paſſport or certificate, or any of the papers ſpecifying the place to which the ſhip was deſtined, but only the place from whence ſhe ſailed; but the Court held him precluded from referring to the *French* copy in contradiction to that tranſlation which had by agreement been introduced upon the caſe.]

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Best Serjt. *contrà*. The *Mount Vernon* being warranted to be an *American* ship, must in every sense of that description be completely *American*, and be furnished with all the documents of an *American* ship; or the warranty is not fulfilled. It is not necessary to deny as a general proposition, that for the purposes of trade a man must be considered to be of that country where he happens to be domiciled. But to that general proposition must be added this qualification, that the universal practice of nations on this point may be varied by the particular regulations of any individual state, as far as respects that state, and the subjects of that state. Every nation has a right to say upon what terms foreigners shall be allowed to be naturalized among them, or otherwise become entitled to the protection of the state; and they have a right also to direct that the property as well as the persons of foreigners coming to reside amongst them, shall have complied with certain stipulated forms before it shall be deemed to be the property of a member of such a state. Upon this principle *America* has acted; she found that her population was rapidly increasing by the influx of foreigners, and that numbers were aiming at a participation of that commerce which she by her neutrality had protected during the war. This gave rise to the naturalization act, and till a foreigner has complied with the requisites of that act he cannot claim any of the privileges of a citizen of the *United States*. On the same principle also proceeds the *American* navigation act, declaring that no ship shall be denominated and deemed a ship of the *United States*, and entitled to the benefits and privileges appertaining to such ships unless registered, and that she shall not enjoy the same longer than she shall continue to be wholly owned and commanded by a citizen of the *United States*. The legislature of *America* therefore has decided what ship answers the description of the warranty contained in this policy, and it is perfectly clear that the *Mount Vernon* was not that kind of ship to which alone the *American* government has extended the privileges of *American* protection. Had the legislature of *America* meant to confer upon the ships belonging to the citizens of that country nothing more than certain advantages in the payment of duties, that meaning would have been particularly expressed. The terms of the act exclude ships not complying with the provisions of the act from all privileges, and certainly not the least valuable privilege conferred by a neutral state is that of being exempted from the calamities of war. It appears indeed that the *Mount Vernon* had no sooner cleared the *De-*

laware than ſhe was captured by the *French* privateer, who, aware that ſhe was not *American* property, watched her departure. Nor is there any weight in the argument that if this ſhip could not be warranted *American*, ſhe could not be warranted of any other nation; for it does not follow that becauſe a man by his conduct forfeits his rights as a ſubject of one country, he therefore neceſſarily and *eo inſtanti* acquires rights as a ſubject of ſome other country. The ſentence of condemnation completely ſupports the ſecond objection, *viz.* that the captain was not a citizen of the *United States*; for, after alleging among the reaſons of condemnation, "the captain being a *Portugueze* without a certificate of his naturalization," it proceeds in the adjudicating part to condemn after "a ſerious examination," (that is, of all the facts previouſly alleged) "the ſhip *Mount Vernon*, captain *George Dominico*, *Portugueze*." Conſiſtently therefore with all the deciſions upon the effect of foreign ſentences, and particularly with the doctrine lately laid down at the *Cockpit* in the caſe of *Kinderſley* v. *Chaſe*, *Park*, 363. (*o*) ed. 5. it is not competent to the Plaintiffs to diſpute the fact of the captain being a *Portugueze*. For if a ſentence ſtate ſeveral facts ſufficient to legalize condemnation, and then proceed to condemn generally, the facts ſtated in the ſentence are concluſive and cannot be controverted. But in this caſe the court have alleged in the adjudicating part of the ſentence that the captain was a *Portugueze*, which precludes any argument upon the point. It is obſervable alſo, that the title of the ſentence of condemnation is not of an *American* ſhip, but "of the *Engliſh* ſhip *Mount Vernon*." But thirdly, the ſhip's papers are not ſuch as the treaty between *America* and *France* requires; conſequently in that reſpect the warranty is not fulfilled. The obſervation made by Mr. Juſtice *Heath* on the defect of the paſſport in not ſtating the place of habitation of the maſter, is of itſelf a ſufficient bar to the Plaintiffs' recovery; for it is impoſſible to apply to him the words "of the town of *Philadelphia*," without applying alſo to him the words "424 tons burthen," which immediately follow. This omiſſion poſſibly weighed much with the *French* court in coming to the concluſion that he was not an *American*. But independent of this objection, it appears that the deſtination of the ſhip is not truly deſcribed in the paſſport. The deſtination ſtated in the paſſport is "*Hamburgh*;" the deſtination found upon the caſe is "*Cowes* and a market," ſubject to the direction of the Plaintiffs. The variance between the two deſcriptions is moſt evident, and with a view to a compliance

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with the treaty moſt important; the ſhip having been repreſented as proceeding to a neutral port, when in fact ſhe was proceeding to the port of a belligerent. It is not neceſſary to inſiſt that this would have been good ground of condemnation, for if it would have juſtified detention only, the underwriter is diſcharged. *Rich* v. *Parker*, 7 *T. R.* 705. If it be argued that the paſſport need not have noticed her deſtination, and that poſſibly her certificate of clearance is correct in the ſtatement of the deſtination, ſtill there muſt in that caſe be a diſcordancy among the ſhip's papers, which of itſelf would induce the cruiſers of *France* to detain her for examination. Indeed if ſuch be the caſe, that *bona fides* which has been urged as a juſtification of the deſcription muſt be abandoned; for if her certificate ſtates her real voyage, and her paſſport ſome other voyage, it is clear that the latter deſcription was not introduced becauſe her deſtination was not decided upon at the time of her ſailing, but with a view to deceive the belligerent powers.

Bayley in reply obſerved, that whatever the title of the ſentence might be, the ſentence itſelf did not profeſs to condemn on the ground of the *Mount Vernon* being an *Engliſh* ſhip, and therefore the title could have no effect whatever. He added, that the fifth reaſon ſtated in the ſentence nearly amounted to a declaration of war with *America*, and evidenced moſt ſtrongly that ſhe was condemned for being an *American*; the *United States* having at that time diſpleaſed *France* by their treaty with *Great Britain*.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord ALVANLEY Ch. J. who after ſtating the caſe proceeded thus: The firſt claſs of objections to the Plaintiff's recovery in this caſe which I ſhall conſider, ariſes from the ſuppoſed non-compliance with the treaty between *America* and *France*. That treaty requires that in caſe either of the parties to the treaty ſhall be engaged in war, the ſhips and veſſels belonging to the ſubjects or people of the other muſt be furniſhed with a ſea-letter or paſſport expreſſing the name, property, and bulk of the ſhip, and alſo the name and place of habitation of the maſter or commander of the ſhip. Now in the paſſport ſtated in this caſe, the name of the maſter is undoubtedly ſet forth; but I think it would be a ſtrange perverſion of the conſtruction of language to hold that the words "of the town of *Philadelphia*," which immediately follow the name of the ſhip, are applicable to the maſter, and deſcriptive of his habitation, and not of the port to which the ſhip belonged. If

therefore

therefore there was not a general admiſſion that the ſhip, "together with the uſual documents taken out by *American* veſſels," had the paſſport ſtated, I ſhould have been of opinion that the treaty had not in this reſpect been ſufficiently complied with, but I think from that general admiſſion we are at liberty to preſume that ſhe had on board a ſea-letter, expreſſing the name and place of abode of the maſter, and conſequently that in this reſpect ſhe did not violate the treaty between *America* and *France*. The ſame preſumption may alſo be made in favour of the Plaintiffs, with reſpect to the objection taken, that the paſſport did not truly deſcribe the deſtination of the ſhip: for though in the paſſport it is alleged that ſhe was bound for *Hamburgh*, whereas her inſtructions were to go to *Cowes*, and a market, yet the latter deſtination may poſſibly have appeared upon the certificate of clearance, which we muſt ſuppoſe her to have had among the other documents uſually taken out by *American* veſſels. The next conſideration is, Whether this ſhip was ſo owned and commanded as to have entitled herſelf to the privileges of an *American* ſhip, and thereby have complied with the warranty? It is inſiſted on the part of the Plaintiffs, that the non-compliance with the regulations of the *American* navigation act, although it may deprive the owners of the ſhip of certain municipal benefits, cannot affect the warranty: for that if the owner be really and *bond fide* a domiciled inhabitant of *America*, his ſhip thereby becomes an *American* ſhip within the meaning of the treaty between *France* and *America*. I am very far from thinking that ſuch is the true conſtruction of that treaty. The words of the navigation act are, that "no ſhips or veſſels ſhall be denominated and deemed ſhips or veſſels of the *United States*, and entitled to the benefits and privileges appertaining to ſuch ſhips or veſſels, unleſs they comply with the regulations of the navigation act." It has been argued that the *Americans* poſſibly may have the ſame ſort of diſtinction with reſpect to ſhips regiſtered and not regiſtered as we have, and although the latter may not be entitled to ſome particular municipal privileges, yet that they are entitled to the protection of the *American* government. It does appear to me however, that the privilege of carrying the *American* flag as a ſafe conduct among belligerent powers, is one of thoſe privileges intended to be denied to all ſhips but thoſe which have complied with the regulations of the *American* navigation act. It is admitted that the owner of the *Mount Vernon* not having been naturalized

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turalized in *America*, his ſhip had not acquired the privileges conferred upon ſhips by the navigation act: and I do not perceive enough ſtated upon the caſe to ſatisfy me that the *French* had not a right to ſay that they were only obliged to reſpect as veſſels of the *United States* thoſe veſſels which the legiſlature of *America* had reſolved ſhould excluſively be deemed and denominated veſſels of the *United States*. The next ſubject of conſideration in this caſe is the ſentence of condemnation. Like other *French* ſentences it ſtates many reaſons, but draws no conſequences from thoſe reaſons: and though ſeveral facts are ſtated, as if leading either to the concluſion that the *Mount Vernon* was enemies' property, or that ſhe had not complied with ſome conditions requiſite to eſtabliſh her claim to the privileges of neutrality, yet the only concluſion at laſt drawn from theſe premiſes is, that the ſhip belongs to the captors as prize. If the words prefixed to this ſentence, *viz.* "Condemnation of the *Engliſh* ſhip *Mount Vernon*," are to be deemed part of the ſentence, they are of themſelves imperative upon us to hold that the warranty has not been complied with. Theſe words however are followed by this expreſſion, "Extract from the books of the office of the proviſional tribunal reſpecting prizes eſtabliſhed in *Saint Domingo*," and then the ſentence is ſtated at length. It has been argued that the fourth reaſon ſtated in the ſentence is not a direct allegation that the captain was a *Portugueze*, but only that he had not about him at the time of the capture the evidence of his having been naturalized. I think, however, the allegation as it now ſtands, coupled with what is ſtated in the adjudicating part of the ſentence, *viz.* that "the ſaid ſhip *Mount Vernon*, captain *George Dominico*, *Portugueze*, has been duly and juſtly captured," ſufficiently eſtabliſh that he was a *Portugueze*, and not a citizen of the *United States*. Now I think it was eſſential to the character of an *American* ſhip, that the captain ſhould, according to the regulations of the *American* navigation act, have been a citizen of the *United States*. It is unneceſſary for us at this time of day to deliver any opinion reſpecting the admiſſibility of ſentences of condemnation, as operating againſt the rights of third perſons, ſtrangers to the ſuit. On that point doubts have been entertained by very great authorities: but conſiſtently with the caſe of *Hughes* v. *Cornelius* (*a*), and a long ſeries of determinations in *Weſtminſter-Hall*, we muſt hold them to be admiſſible and concluſive between

(*a*) 2 *Shew.* 232.

the assured and the underwriter, with respect to every fact which they profess to decide (*a*). If indeed it had appeared that the sentence proceeded, not upon a falsification of the warranty contained in the policy, but upon some positive regulations of *France*, adopted without the assent of other nations, and contrary to the law of nations, the assured would still have been at liberty to prove his neutrality. No question can now arise as to the effect of such a warranty as the present: for I take it to be completely established by the cases of *Barzillay* v. *Legris* (*b*), *Geyer* v. *Aguilar* (*c*), and *Rich* v. *Parker* (*d*), that if a ship be warranted *American*, she must not only belong to an *American*, but must in every respect be so documented as to entitle herself during the whole of her voyage to the privileges of the *American* flag. It was once doubted indeed by Lord *Kenyon* in the case of *De Souza* v. *Ewer* (*e*), whether the mere fact of condemnation as prize was not of itself conclusive against the warranty of neutrality, though special grounds of condemnation appeared upon the sentence not warranted by the law of nations: for it was considered that a contrary doctrine would impute bad faith to the tribunal by which the condemnation was pronounced; and unless such special grounds appear the sentence is undoubtedly conclusive. Accordingly in *Saloucci* v. *Woodmass* (*f*) where a ship warranted neutral was condemned as good and lawful prize, that single allegation in the sentence was deemed sufficient to negative the neutrality of the ship, because, as no special ground of condemnation appeared, the court held themselves bound to suppose that it proceeded upon the just and lawful ground of the ship being enemies' property. But in *Bernardi* v. *Motteux* (*g*) the Court considered the sentence conclusive as to every thing which it professed to decide, yet held themselves at liberty to examine whether the ground on which the sentence proceeded actually falsified the warranty contained in the policy. Then follows a series of authorities in which the courts have determined that if the condemnation does not plainly proceed upon the ground of enemies' property, or that of the ship not having complied with subsisting treaties between her own country and that of the capturing power, but on the ground of regulations arbitrarily imposed by the latter, to which neither the government of the captured ship, nor the

(*a*) *Dict. per Le Blanc* 3 *T. R.* 444.
(*b*) *Park. Insur.* 359.
(*c*) 7 *T. R.* 681.
(*d*) 7 *T. R.* 705.
(*e*) *Park. Insur.* 361.
(*f*) *Park. Insur.* 362.
(*g*) *Doug.* 574.

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other powers of *Europe* have been made parties, ſuch a condemnation ſhall not be admitted as concluſive againſt the warranty of neutrality. Such was the doctrine laid down in *Mayne* v. *Walter* (*a*), and confirmed in the ſubſequent caſes of *Pollard* v. *Bell* (*b*), and *Bird* v. *Appleton* (*c*). The late caſe of *Price* v. *Bell* (*d*), is extremely like the preſent, and indeed if it were not for the words prefixed to the ſentence in this caſe, there would be as much analogy as poſſible between the two caſes. The ſentence there proceeded upon much the ſame ground as the preſent ſentence: and the Court of King's Bench was of opinion that there was nothing ſufficiently concluſive upon the face of the ſentence to negative the neutrality, the condemnation apparently proceeding upon reaſons which were not juſtifiable. The laſt caſe to which I ſhall advert is that of *Kinderſley* v. *Chaſe*, decided at the Cockpit, *July* 21. 1801, on appeal from the Mayor's Court at *Madras*, and reported in *Park's Inſur.* p. 363. *o.* ed. 5. The judgment of the Court was there pronounced by the preſent Maſter of the Rolls, in a very able manner, who, after conſidering the concluſiveneſs of foreign ſentences upon warranties of neutrality, and acquieſcing in moſt of the principles laid down in our Courts, proceeded to diſcuſs the particular ſentence upon which that caſe came before the Council. He there adopted a principle moſt eſſential to be attended to in the conſtruction of foreign ſentences, namely, that the reaſons ſtated in thoſe ſentences are not always to be conſidered as of themſelves the grounds upon which the condemnation proceeds, but as the *media* of proof from whence a preſumption may be drawn that the ſhip is or is not lawful prize. We are called upon therefore to conſider what conſtruction we ought to put upon the ſentence of condemnation ſtated in this caſe. The queſtion will be, Whether on the face of that ſentence ſufficient appears to ſhew that the *Mount Vernon* was condemned by the *French* court, not on the ground of her being enemies' property, but beauſe ſhe had contravened ſome arbitrary edict of *France*, or not conformed to ſome regulation to which ſhe was not bound to conform; or whether, on the other hand, taking the whole of the ſentence together, we are not under the neceſſity of holding, as was holden in the caſe of *Kinderſley* v. *Chaſe*, that it muſt be conſtrued liberally in favour of the underwriters, and we muſt conclude that it proceeded on the ground of the ſhip being enemies' property, unleſs the contrary diſtinctly appear? In the body of

(*a*) *Park Inſur.* 363.
(*b*) 8 *T. R.* 434.
(*c*) 8 *T. R.* 562.
(*d*) 1 *Eaſt*, 663.

the

the ſentence there is nothing to ſhew that it proceeded on the want of any particular document, or non-compliance with any particular edict. In every country but our own, throwing papers overboard has, I believe, been holden to be ſufficient cauſe of condemnation; though I am not ſure whether in *France* that rule has been ſo laid down by way of poſitive inſtitution, or only as a mode of evidence from which the concluſion is to be drawn that the ſhip is enemies' property. Indeed in *England* that circumſtance alone has often been deemed ſufficient to warrant the ſame concluſion. Another reaſon ſtated in the ſentence is, that the crew ran away and refuſed to be examined. Now we all know that by the law of *England*, and I believe by the law of nations, it is incumbent upon the crew of a captured ſhip to ſubmit to examination: and if they do not, every thing hoſtile may be preſumed againſt them. Nobody therefore can ſay that this was not one of the grounds from which the *French* court drew the concluſion that the ſhip was enemies' property. Then comes the laſt reaſon ſtated in the ſentence, which I confeſs has raiſed conſiderable doubts in my mind as to the propriety of the ſentence. I did think that notwithſtanding all the reaſons previouſly ſtated, it might be fairly argued that the ſentence proceeded upon the laſt reaſon only, and was a declaration of war againſt *America*, conſidering *America* as having granted to *England* improper privileges. If this be ſo, the aſſured have a right to ſay that the *Mount Vernon* was condemned, not becauſe ſhe was not an *American*, but becauſe ſhe was an *American*. If therefore the title prefixed to this ſentence, was not to be conſidered as part of the ſentence, I ſhould very much doubt whether there were ſufficient on the face of the ſentence to warrant the concluſion that the ſhip was condemned on the ground of her being *Engliſh*: but if it be part of the ſentence, then the laſt reaſon ſtated is very material with reſpect to the conſideration whether the ſhip were *Engliſh* or not; for it was not unnatural for the *French* court to couple with the other circumſtances ſtated in the ſentence, the favourable diſpoſition of *America* towards *England*, and the readineſs to furniſh the *Engliſh* with ſuch documents as would entitle them to the privileges of the *American* flag. If therefore the laſt reaſon be not conſidered with reference to the title, that reaſon of itſelf, unconnected with the conſideration whether the ſhip was *Engliſh* or not, might be deemed the real ground of the condemnation, and then the underwriters would unqueſtionably be liable.

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But coupling this title with the objections taken to the ſhip's papers, and the regulations by treaty between *America* and *France*, and conſidering that it makes no difference whether the ground on which the ſhip was condemned appear at the beginning or the concluſion of the ſentence, I am of opinion, and my Brothers concur with me for all or ſome of theſe reaſons, that the *Mount Vernon* was condemned either as not being an *American*, or for not having thoſe documents which entitled her to the privileges of the *American* flag in the court of a belligerent power. The poſtea therefore muſt be delivered to the Defendant.

Per Curiam, Poſtea to the Defendant.

END OF TRINITY TERM.

CASES

ARGUED and DETERMINED IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

IN

Michaelmas Term,

In the Forty-third Year of the Reign of GEORGE III.

1802.

SMITH and Another, Assignees of J. S. a Bankrupt, *v.* BARCLAY.

Nov. 11th.

In an action by the assignees of a bankrupt, it is not sufficient for the bankrupt to negative a tender in Bank notes.

THIS was an application to the Court to discharge the Defendant out of custody on his entering a common appearance, the affidavit to hold to bail being made by the bankrupt, and stating a commission to have issued against himself, under which the Plaintiffs were appointed assignees, and that the Defendant was justly and truly indebted to them, "and that no tender or offer had been made to pay the said debt, or any part thereof, in or by any notes of the Governor and Company of the Bank of *England*, expressed to be payable on demand."

Bayley Serjt., objected to this affidavit as being made by the bankrupt, who could not take upon himself expressly to negative a tender which might have been made to his assignees. He cited *Smith* v. *Tyson*, *ante*, vol. 2. p. 339.

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Reſt Serjt. *contrà*, ſubmitted that the aſſignees ought not to be called upon to make an affidavit, and referred to *Lawſon* v. *M'Donald*, *ante*, vol. 2. p. 590. where the Court did not call upon the clerk of the peace, in whom the eſtate of an inſolvent had been veſted, and in whoſe name an action was commenced, to negative the tender.

The Court held the affidavit inſufficient, and made the Rule abſolute (*a*).

(*a*) See *Percy* v. *Powell*, *ante*, p. 6. and *n.* (*a*), p. 7.

Nov. 13th.

WILKINS *v.* MARY WETHERILL and CHARLOTTE COUTTS.

If a feme covert be taken in execution, under a warrant of attorney given by her as a feme ſole, the Court will not diſcharge her on a ſummary application.

THIS was an application to the Court, calling on the Plaintiff to ſhew cauſe why the judgment ſigned in this caſe againſt *Charlotte Coutts*, one of the Defendants, and the writ of execution thereon, ſhould not be ſet aſide for irregularity, and the ſum of 42*l.* 17*s.* 6*d.* levied thereon, be reſtored to her.

The ground of this application was, that the judgment was entered up on a warrant of attorney given by *Charlotte Coutts* jointly with *Mary Wetherill*, the other Defendant, the former being a feme covert at the time when the warrant was given. It appeared from the affidavits that *Mary Wetherill*, who was a widow and the mother of *Charlotte Coutts*, having been arreſted for a debt, the latter joined with her in a warrant of attorney to confeſs judgment, in order to obtain her mother's diſcharge; that the Plaintiff was not apprized that *Charlotte Coutts* was a *feme covert*: and that having entered up judgment on the warrant of attorney, *Charlotte Coutts* was taken in execution, whereupon her huſband paid the debt.

Praed Serjt., being called upon to ſupport the rule, contended that *Charlotte Coutts*, being a *feme covert*, her deed was abſolutely void: and he cited the caſe of *Saunderſon* v. *Marr*, 1 *H. Bl.* 75. where the Court ſet aſide a judgment on a warrant of attorney given by an infant, though he had promiſed not to take advantage of his infancy.

The Court ſaid it was very evident that the caſe of *Saunderſon* v. *Marr*, proceeded on the ground of the Plaintiff being appriſed that

that the Defendant was an infant at the time that he gave the warrant of attorney, whereas in this caſe the Plaintiff was not appriſed that *Charlotte Coutts* was a *feme covert* at the time the warrant of attorney was given. They obſerved that it had been repeatedly decided that the Courts would not aſſiſt a *feme covert* in a ſummary way who obtained credit by acting as a *feme ſole* (*a*); and that *Charlotte Coutts* therefore muſt reſort to her writ of error.

Rule diſcharged (*b*).

(*a*) See *De Gaillon v. L'Aigle, ante*, vol. 1. p. 8. and the note to that caſe. Alſo *Pearſon* v. *Meadon*, 2 *Bl.* 903. *Partridge* v. *Clark*, 5 *T. R.* 194. and *Waters* v. *Smith*, 6 *T. R.* 451. But where a feme covert obtained credit upon a miſtaken repreſentation that her huſband was dead, the Court of *K. B.* diſcharged her upon common bail, becauſe no fraud was intended. *Pitt* v. *Thompſon*, 1 *Eaſt*. 16. And the ſame was done in *March* v. *Capelli*, where the huſband was abroad, though upon terms of ſeparation. *Id.* p. 17.

(*b*) See alſo *Maclean* v. *Douglas*, *ante*, p. 128.

PIGOTT and Another *v.* TRUSTE.

Nov. 16th.

If a plaintiff, having taken an aſſignment of the bail-bond while the action is pending, proceed upon it after the cauſe is out of court, the proceedings cannot be ſet aſide for irregularity. But the Court will ſtay ſuch proceedings if it appear that the plaintiff has been guilty of laches.

THIS was an application calling upon the Plaintiffs to ſhew cauſe why the aſſignment of the bail bond and the proceedings thereon (if any had been had), ſhould not be ſet aſide for irregularity. The application was made on the behalf of the bail on *affidavit* ſtating, that the action was commenced againſt the Defendant ſo long ago as the 8th *June* 1801; that the bail-bond was immediately given to the ſheriffs of *London*; that ſhortly after this an arrangement between the parties took place; and that the bail never heard any thing more of the action until the 6th of *October* laſt, when they were ſerved with proceſs at the ſuit of the Plaintiffs, as aſſignees of the ſheriff. It was alſo ſworn that no declaration was filed either in the term in which the action was commenced, or in the *Michaelmas* term following; and alſo that no rule for time to declare was obtained either in the ſaid *Michaelmas* term, or in *Hilary* term following. On the part of the Plaintiffs, it was ſworn that in *Trinity* term 1801, bail above not being put in within due time, they took an aſſignment of the bail bond, on which they were now proceeding.

Bayley Serjt. ſhewed cauſe, and inſiſted that the Plaintiffs were perfectly regular in their proceedings, for that having taken an aſ-

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ſignment of the bail bond in *Trinity* term 1801, while the action was pending in the court, they had thereby acquired a right of action under the ſtature, and conſequently were entitled to proceed. He obſerved that on this ground the caſe was diſtinguiſhable from that of *Sparrow* v. *Naylor*, 2 *Bl.* 876. where the Court ſtayed proceedings on a bail bond which had been aſſigned after the cauſe was out of court.

Shepherd Serjt., in ſupport of the rule, argued that the circumſtance of having taken the aſſignment within due time could make no difference, as the plaintiffs had omitted to proceed within due time; and that if a contrary practice were to prevail, the bail would be liable at any indefinite period, though they had been induced by the *laches* of the plaintiff to ſuppoſe the action completely at an end, and had been thereby deprived of the opportunity of applying to the Court for leave to put in bail above upon terms, or of rendering the defendant. He obſerved that the reaſon why the action on the bail bond muſt be brought in the court where the original action was commenced, is, that the Court may be able to regulate proceedings upon the bail bond in ſuch a way as to do juſtice to the parties; and that the ground upon which the Court proceeded in *Sparrow* v. *Naylor*, was, that as ſoon as the cauſe is out of court, the Court ceaſes to have juriſdiction over the bail bond.

The Court were of opinion that the preſent rule could not be ſupported, it being moved on the ground of irregularity: for the aſſignment having been taken in due time, the plaintiffs were perfectly regular in their proceedings. They ſaid that this caſe differed eſſentially from that of *Sparrow* v. *Naylor*, becauſe the aſſignment in that caſe having been taken after the cauſe was out of court, was a mere nullity (*a*), whereas here the aſſignment having been taken within time, the Plaintiffs ſo far were right. They added, however, that both caſes were pregnant with the ſame inconvenience, and if the bail applied to the equitable juriſdiction of the Court, they ſhould find no difficulty in ſtaying the proceedings on the bail bond in this and in all other caſes where it ſhould appear that the plaintiffs had by their neglect forfeited their claim to inſtitute proceedings againſt the bail.

Rule diſcharged.

(*a*) The words of 4 *Anne*, *c.* 16. *ſ.* 20. are "the ſheriff or other officer at the requeſt and coſts of the plaintiff *in ſuch action or ſuit*, or his lawful attorney ſhall aſſign," &c.

RATCLIFFE *v.* BURTON.

Nov. 18.

TRESPASS for breaking and entering the dwelling-houſe of the Plaintiff, and making a great noiſe and diſturbance, &c. there, and forcing and breaking open, breaking to pieces, damaging and ſpoiling the doors and windows and the locks, bolts, bars, ſtaples, and hinges thereto affixed.

Semb. that a ſheriff's officer acting under civil proceſs may juſtify breaking the inner doors of the defendant's houſe, tho' he be not therein at the time. But in ſuch caſe the officer muſt firſt demand admittance.

Plea as to the ſuppoſed treſpaſſes, that before the ſaid time when, &c. a writ of *alias latitat* iſſued out of the *King's Bench*, directed to the ſheriffs of *London*, by which they were commanded to take the Plaintiff, if he ſhould be found in their bailiwick, and ſafely keep him, &c. ſo that, &c.; that the ſaid writ was indorſed for bail for 30*l.* and before the ſaid time when, &c. was delivered to the ſaid ſheriffs, who directed their warrant to the Defendant and one *J. A.* as ſerjeants at mace, and thereby commanded them to take the Plaintiff to anſwer, &c. "which ſaid warrant afterwards and before the return of the ſaid writ, and before the ſaid time when, &c. to wit, on the day and year laſt aforeſaid, in the pariſh aforeſaid, was delivered to the ſaid Defendant, to be executed in due form of law, by virtue of which ſaid warrant the ſaid Defendant, as ſuch ſerjeant at mace as aforeſaid, afterwards and before the time for the return of the ſaid writ, to wit, at the ſame time when, &c. and within the bailiwick of the ſaid *William Rawlins* and *Robert Abbion Cox*, as ſuch ſheriffs as aforeſaid, peaceably and quietly entered into the ſaid dwelling-houſe, in which, &c. the outer door thereof then and there being open, in order to take and arreſt the Plaintiff under and by virtue of the ſaid writ and warrant, as it was lawful for him to do, for the cauſe aforeſaid, and in order to arreſt the ſaid Plaintiff, and by virtue of the ſaid writ and warrant, did then and there neceſſarily and unavoidably make a little noiſe and diſturbance in the ſaid meſſuage or dwelling-houſe, and ſtay and continue therein making ſuch noiſe and diſturbance for the ſaid ſpace of time in the ſaid declaration mentioned, and becauſe at the ſaid time when, &c. the ſaid Plaintiff not having been taken and arreſted under or by virtue of the ſaid writ or warrant, and the entrance of divers, to wit, ten of the rooms and apartments of the ſaid dwelling-houſe, and of and belonging to the ſame, being faſtened and ſtopped up by and with the ſaid doors, windows,

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locks, bolts, bars, ſtaples, and hinges, in the introductory part of this plea mentioned, ſo that without forcing and breaking open the ſame the ſaid Defendant could not at the ſaid time when, &c. ſearch for or arreſt the ſaid Plaintiff in the ſame rooms and apartments he the ſaid Defendant at the ſaid time when, &c. in order to ſearch for, find, and arreſt the ſaid Plaintiff, under and by virtue of the ſaid writ neceſſarily forced and broke open the ſaid doors, windows, locks, bolts, bars, ſtaples, and hinges, and in ſo doing neceſſarily and unavoidably a little broke to pieces, damaged and ſpoiled the ſame, doing as little damage as he poſſibly could on the occaſions aforeſaid, which are the ſeveral ſuppoſed treſpaſſes in the introductory part of this plea mentioned, whereof the ſaid Plaintiff hath above in his ſaid declaration in that behalf complained againſt him, and this, &c. wherefore, &c."

To this plea there was a general demurrer and joinder therein.

Bayley Serjt., in ſupport of the demurrer. There are two objections to this plea; 1ſt, It does not ſtate that the Plaintiff was in his houſe at the time when the Defendant entered; 2dly, It does not aver that the Defendant before he broke open the inner doors, locks, &c. of the Plaintiff's houſe, made any demand of leave to enter, nor does it ſhew any particular circumſtances which rendered that breaking neceſſary. With reſpect to the 1ſt point, a ſheriff's officer acting under a *capias* has no authority to enter the houſe of a party who is not in the houſe at the time. If an officer enter a houſe for the purpoſe of arreſting any perſon, he acts at his peril, and is juſtified or not according to the event of the perſon being there or not. Although there be no authority expreſsly in point, there are many which bear ſtrongly upon the ſubject. In *Boldring ſhaw* v. *Rag*, *Cro. Eliz.* 876. the Defendant to an action of treſpaſs pleaded that the Plaintiff was indebted to him in ſuch a ſum, and by licence of the Plaintiff's ſervant, the door being open, he entered to demand his debt; upon demurrer this was adjudged no plea, "eſpecially it being not averred that the maſter, who was the debtor, was then within the houſe; but *Gawdy* conceived that if it had been averred that the maſter was then within the houſe, the plea had been good." There indeed the Defendant was not acting under proceſs, but the caſe diſtinctly recognizes the principle that a treſpaſs may be juſtified or not, according to the event of the party being found within the houſe or not. Upon the ſame

principle where a Defendant juſtified entering the Plaintiff's houſe under a *fi. fa.* to levy *de bonis Philip Biſcop teſtatoris* in the hands of *Lucretia Biſcop*, his executrix, and averred that the executrix was in the Plaintiff's houſe *cum bonis ſuis* and there abiding, it was adjudged to be a bad plea, becauſe it did not aver that *bona teſtatoris* were in the houſe; but if *bona teſtatoris* had been there, the entry had been juſtifiable, *Biſcop* v. *White*, *Cro. Eliz.* 759. So in *Bennet* v. *Gray*, 2 *Roll. Ab.* 564. *Vin. Ab. Treſpaſs*, *H.* a. *pl.* 1. *S. C.* it was decided that a ſheriff could not enter the houſe of *J. D.* and there break a cheſt of *J. N.*, after demand of the keys to ſeek *J. S.* his priſoner, who had eſcaped from arreſt, "but he ought to take it upon him that he was in the cheſt." To the ſame effect is *Stanhope* v. *Dawſon*, 2 *Lutw.* 1428, where exception was taken to a juſtification for entering the Plaintiff's houſe under a writ of *homine replegiando* of one *W. Laycock*; that the Defendant could not enter the houſe, unleſs the perſon to be replevied were there at the time, though it had been expreſsly averred that *Laycock* was eloigned to the ſaid houſe. It is true that there were other objections to the juſtification, and the reaſons of the judgment do not appear, but *Lutwyche* himſelf obſerves that the above was a ſtrong objection. Another caſe, in which it has been holden that the juſtification of the party may depend upon the event of the ſearch, is *Boſtock* v. *Saunders*, 2 *Bl.* 912: where an Exciſe officer was held liable to an action of treſpaſs for breaking the Plaintiff's houſe under a warrant of the commiſſioners to ſearch for uncuſtomed goods. It is true that the caſe of *Boſtock* v. *Saunders* was overruled in that of *Cooper* v. *Booth*, *Trin.* 25 *Geo.* 3. *K. B.* 3 *Eſp. N. P. Caſ.* 135. cited in *Johnſtone* v. *Sutton*, 1 *T. R.* 535. and in *Price* v. *Meſſenger*, *ante*, vol. 2. 160. But it was overruled on the ground of the 10 *Geo.* 1. having been miſconſtrued, not upon any objection to the general principle of law. It is laid down in 2 *Hale*, *P. C.* 151. that "upon a ſearch for ſtolen goods, if the goods be not in the houſe, yet the officer is excuſed, becauſe he ſearcheth by warrant," but it ſeems the party that made the ſuggeſtion is puniſhable in ſuch caſe; for as to him, the breaking of the door is *in eventu* lawful or unlawful, viz. lawful if the goods are there, unlawful if not there. Now by a *capias* the officer is not directed to take the party in any particular houſe, as in the caſe of a ſearch warrant, but his authority is general, and he therefore ſtands in the ſame ſituation

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as the party mentioned by Lord *Hale*, the legality of whose acts depends upon the event. 2dly, A sheriff's officer has no authority to break open the inner doors of an house without first making a demand of admittance. It was expressly determined in *Semayne*'s case, 5 *Co.* 91. that "in process where the King is party, the sheriff cannot break open the outer door of a house without first signifying the cause of his coming, and making request to open the doors;" "for the law, without default in the owner, doth abhor destruction or breaking of any house which is for the habitation and safety of a man, by which great damage and inconvenience may follow to the party when no default is in him, for perhaps he doth not know of the process, which if he hath notice of, it is presumed that he will obey it, and that appeareth in 18 *Ed.* 3. *Execution* 252 (*a*), where it is said that the King's officer who cometh to do execution, &c. may open the doors which are shut, and break them if he may not have the keys, which proveth that he ought first to demand them." This law is confirmed, 2 *Hale*, *P. C.* 117. where it is said that upon warrant to apprehend a felon, the officer must first notify his business that he comes about, and demand admission, whether it be the house of the felon or that of a stranger. And the same he observes of a warrant of the peace. And in p. 151. it is said that upon warrant to search for stolen goods, if the door be shut, and upon demand it be refused to be opened by them within, if the goods be in the house, the officer may break open the door. These authorities establish that where the officer is entitled to break open the outer door, he must first demand admittance; from which it seems to follow, that where he is only entitled to break open an inner door, he ought to do the same, since the same reasons apply to both cases (*b*). In addition to what has already been cited from *Semayne*'s case, it may be observed that it was there expressly decided that notice of the process of the law ought to be certainly and directly alleged in pleading, and that a general allegation, such as

(*a*) *Fitzh. Ab.* in which pl. 252. is misprinted for pl. 152. But *Fitzh.* refers to 18 *Ed.* 2 instead of 18 *Ed.* 3.

(*b*) If the Defendant take refuge in the house of another, the sheriff may break open the outer door in order to take him; for "the house of any one is not a castle or privilege but for himself." *Semayne*'s case, 5th *Rep. Foft. Crown Law*, tit. *Homicide*, c. 8. *f.* 21. p. 320. 2 *Hale. P. C.* 117. But by the same authorities it appears that before the sheriff breaks the house he must demand admission.

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præmiſſorum non ignarus, was not ſufficient. Now in the preſent plea the allegation is merely that the Defendant *neceſſarily* forced and broke open the doors, which is as general as poſſible.

Beſt Serjt., in ſupport of the plea. 1ſt, It is admitted that there is no expreſs authority which decides that a ſheriff's officer acting under civil proceſs becomes a treſpaſſer by entering a Defendant's houſe if the Defendant be not there; and the Court will be extremely cautious of laying down ſuch a propoſition for the firſt time, ſince it is impoſſible for the officer to execute his writ without making diligent ſearch in that place where the Defendant is moſt likely to be found, *viz.* in his own houſe. The caſe of *Holdring ſhaw* v. *Rag*, has no application to the preſent, ſince it turned upon the validity of the licence to the ſervant; beſides which it may be obſerved that the caſe is not law, ſince it is now holden that a man may enter the houſe of another to demand his debt. With reſpect to the caſes of *Biſcop* v. *White*, *Bennet* v. *Gray*, and *Stanhope* v. *Dawſon*, it may be obſerved generally that they related to the houſes of ſtrangers, where the ſheriff certainly enters at his peril. According to the report of *Boſtock* v. *Saunders*, in 3 *Wilſ.* 434., *De Grey* Ch. J., in ſtating his reaſons for holding the officer of Exciſe liable, ſays, "the caſe of a ſheriff's bailiff is very different from this; the bailiff is bound to execute the ſheriff's warrant, the officer of Exciſe is the party promoting and acting for his own benefit under an authority which he has obtained by his own oath, and he is not bound to obey like a ſheriff's officer." Admitting that caſe therefore to be an authority, yet in the preſent inſtance the bailiff is not liable, for the very reaſons ſtated in that caſe; and though that caſe was certainly overruled in *Cooper* v. *Booth*, on the conſtruction of the act of parliament, yet the general rules of law there laid down remain unimpeached; and the principle of *Cooper* v. *Booth* eſtabliſhes that where an officer acts under the authority of a warrant, he is juſtified in endeavouring to execute that warrant, though nothing be found, the act itſelf being legal. Upon the ſame ground it is laid down 2 *Hale*, *P. C.* 151, that upon a ſearch warrant, if the goods be not in the houſe, yet the officer is excuſed though the party who made the ſuggeſtion is puniſhable. In the caſe of *White* v. *Whitſhire*, *Palm.* 52. it was agreed that where an officer juſtifies breaking the inner door of an houſe under a *fi. fa.* he need not aver that there were any goods there, for he cannot know this before his entry, and it ſhall be intended that a man has ſufficient goods.

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In the case of a stranger's house, it seems that it ought to be averred that there were goods. *Com. Dig. tit. Execution* (*C.* 5). With respect to the 2d point, if it appear to have been necessary to the execution of the warrant to break the inner doors, &c. the officer was justified in so doing. Now it is averred in the plea, that because the Defendant could not search for and arrest the Plaintiff without forcing and breaking open the inner doors, &c. he the Defendant, in order to search for, find, and arrest the Plaintiff, under and by virtue of the said writ, necessarily forced and broke open the same. This averment shews that the force was not wantonly employed, but was necessary to the execution of the writ; the necessity is admitted by the pleadings; and if the Defendant exceeded his authority, the Plaintiff should have put that fact upon the record by a new assignment. With respect to the authorities which have been cited on this point, it may be observed that they all apply to the outer door of the house, the rules of law respecting which are very distinguishable from those which apply to the inner door of the house. In *Lee* v. *Gansell*, *Cowp.* 7. Lord *Mansfield*, after stating the distinction between the outer and the inner door, cites the following passage from *Fost. C. C. tit. Homicide*, *c.* 8. *f.* 20. (*a*) with approbation; "the rule, that every man's house is his castle, when applied to the case of arrests upon legal process, hath been carried as far as the true principles of political justice will warrant; perhaps beyond what in the scale of sound reason and good policy they will warrant; but in cases of life we must adhere to rules well known and long established; but this rule is not one of those that will admit of any extension; it must therefore, as I have before hinted, be confined to the breach of windows and outward doors intended for the security of the house against persons from without endeavouring to break in."

Lord ALVANLEY Ch. J. I think we may determine this case without entering into the great question which has been raised, Whether a sheriff's officer may justify entering the house of a person against whom he has civil process, to ascertain whether he be there or not? My own opinion is, that he may. I will therefore suppose that the sheriff's officer has a right to enter in a peaceable manner, in order to satisfy himself whether the person mentioned in the writ is to be found in his own house within the bailiwick.

(*a*) P. 319.

The next queſtion is, Whether an officer who enters for this purpoſe without any particular reaſons for ſuppoſing the party to be within his houſe, has a right to act in the manner in which the Defendant upon this record appears to have acted: whether he has a right to break open ſuch inner doors as may happen to be ſhut, without any previous demand of admittance? If the officer have certain knowledge that the party is within the houſe, it might be abſurd for him to demand any admittance; ſince if he were to do ſo, the party might poſſibly eſcape by the window while the officer was demanding admittance at the door. No authority has been cited to ſhew that where the officer enters merely for the purpoſe of aſcertaining whether the party be there, he can juſtify violence for that purpoſe without a previous demand of admittance. It would be carrying the law upon this ſubject to an alarming extent, if the Court ſhould hold that becauſe a man happens to owe money in any part of *England*, the ſheriff of the county in which his houſe is ſituated may break open every door and every trunk in which a man might be concealed, and this as often as he ſhould think proper before the return of the writ. It appears to me that the law has gone quite far enough upon this ſubject. It has ſaid that the outer door of the houſe is the man's caſtle, but that the inner doors may be broken open for the execution of civil proceſs. It has never ſaid, however, that the officer may juſtify breaking the inner doors without averring a previous demand of peaceable admittance, or ſhewing why ſuch violence was neceſſary. Without ſuch averment, it does not appear that he did nothing more than was neceſſary towards making a reaſonable ſearch. In this caſe the Defendant neither ſtates that the party was there, nor even that he had reaſonable ground of ſuſpicion. Had either of theſe circumſtances been ſtated, I do not ſay that he would have been guilty of a treſpaſs. I deſire to be conſidered as confining theſe obſervations to the caſe of civil proceſs only, without in any degree extending them to the caſe of criminal proceſs. The preſent therefore being a caſe of civil proceſs, I do not think the juſtification ſtated by the Defendant ſufficient to entitle him to the judgment of the Court.

HEATH, J. I am of the ſame opinion. This plea appears to me to be bad, becauſe it ſtates no demand of admittance; and I ſhall give my opinion on that point alone. *Semayne*'s caſe is a direct authority upon the ſubject. By the ſixth reſolution of that caſe, it appears that it is not only neceſſary for the officer to make a demand,

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mand, but that the demand muſt be pleaded; and for want of ſuch an averment the Plaintiff there was prevented from recovering. The law of *England*, which is founded on reaſon, never authoriſes ſuch outrageous acts as the breaking open every door and lock in a man's houſe without any declaration of the authority under which it is done. Such conduct muſt tend to create fear and diſmay, and breaches of the peace by provoking reſiſtance. This doctrine would not only be attended with great miſchief to the perſons againſt whom proceſs is iſſued, but to other perſons alſo, ſince it muſt equally hold good in caſes of proceſs upon eſcape, where the party has taken refuge in the houſe of a ſtranger. Shall it be ſaid that in ſuch caſe the officer may break open the outer door of a ſtranger's houſe without declaring the authority under which he acts, or making any demand of admittance? No entry from the books of pleading has been cited in ſupport of this juſtification, and *Semayne*'s caſe is a direct authority againſt it.

ROOKE, J. I am of the ſame opinion. Without referring at all to the caſe of criminal proceſs, I ſhall give my opinion ſolely upon theſe two queſtions, whether a ſheriff's officer, having entered a houſe peaceably under civil proceſs, can juſtify breaking an inner door, without making a previous demand of admittance; and whether enough is ſtated upon theſe pleadings, from whence it may be inferred that ſuch demand was made, or that it may be diſpenſed with. I am of opinion that the neceſſity of breaking the doors is not ſufficiently ſtated to diſpenſe with the demand. It is not ſhewn why the Defendant could not have made his ſearch without breaking open the doors, provided he had made a demand. I muſt take it for granted therefore upon theſe pleadings that no demand was made. What a privilege will be allowed to ſheriffs' officers if they are permitted to effect their ſearch by violence, without making that demand which poſſibly will be complied with, and conſequently violence be rendered unneceſſary? With reſpect to the caſe of *Lee* v. *Ganſell*, nothing turned upon the want of notice, nor the mode of breaking. The queſtion was not whether a treſpaſs had been committed, but whether the officer having found General *Ganſell*, the latter was entitled to be diſcharged on ſummary application. The general aſſertion of Lord *Mansfield* muſt be taken with reference to the particular caſe before him, not as affecting a caſe which was not even touched upon in argument. That caſe therefore affords no authority for the Defendant; and *Semayne*'s

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case on the contrary expressly decides that a demand must be made and stated with sufficient certainty. The case of 18 *Ed.* 3. referred to in *Semayne's* case is still more in point, for it is there stated in terms that the officer must first demand the keys. On these pleadings therefore I have no hesitation in saying that judgment must be given for the Plaintiff.

CHAMBRE, J. Not having been present at the whole of the argument, I shall content myself with saying that I concur in opinion with the rest of the Court upon the second point; namely, that the breaking of the inner doors of the house is not justified by this plea. It would be mischievous indeed if such a latitude were allowed to sheriffs' officers as that which is now claimed. It lies on the party claiming such a right as that of breaking the doors of a house, to shew upon what grounds he does so. It is said that the Defendant's acts were necessary to the execution of the process; and that they appear to have been so by these pleadings. But the Court requires that the circumstances from which that necessity arises should be stated. This the Defendant has not done. I have therefore no doubt that judgment ought to be given for the Plaintiff.

Judgment for the Plaintiff. (*a*)

(*a*) Though no decided case is to be found upon the point here determined, there is an expression in *White v. Whitshire*, *Palm.* 54. which shews the opinion of two Judges in the 17 *Jac.* 1. that the sheriff ought to demand admission before he breaks open an inner door. "*Doddridge* and *Haughton* said that if the sheriff be in one room, he may break open another upon having been refused admittance."

(IN THE EXCHEQUER CHAMBER.)

LEWIS *v.* LEGH in Error.

Nov. 18th.

THIS was an action of debt on a resignation bond given by the master of a public school. (For the pleadings, argument, and judgment in the King's Bench, see 1 *East* 391.)

Manley was this day to have argued for the Plaintiff in error, and *Giles* *contrà*;

But *The Court* were clearly of opinion that it did not sufficiently appear upon the record that the office of schoolmaster, to which the Plaintiff in error had been appointed was such an office as ought,

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for the ſake of the public, to be deemed a freehold office, and that it was therefore impoſſible to raiſe the important queſtion which it was the intention of the parties to litigate; upon which queſtion they declined giving any opinion.

Per Curiam, Judgment affirmed.

Nov. 19th.

HARDING *v.* HENNEM.

If *A.*, being arreſted by *B.* on proceſs of this Court, give bail to the ſheriff, and before the return of the writ being again arreſted by *C.* is committed to the *Fleet* priſon, after which and before the return of the firſt writ, *B.* takes an aſſignment of the bail-bond and proceeds thereon, the Court will ſtay ſuch proceedings, but will not make *B.* pay coſts, for they will not try upon affidavit whether he knew or not that *A.* was in cuſtody, but will conſider him ignorant of that fact unleſs notice of ſurrender has been regularly given.

THE Defendant having been arreſted on a writ returnable on the morrow of the *Holy Trinity*, at the ſuit of the Plaintiff, gave bail to the ſheriff; ſoon after this, *viz.* on the 11th of *June*, and before the return of the firſt writ, he was again arreſted by the ſame ſheriff, at the ſuit of ſome other perſon, and not being able to procure bail, was removed by *habeas corpus* and *committitur* to the *Fleet*; of his being thus removed and committed no notice was given to the Plaintiff, who for want of bail above being regularly put in and perfected, took an aſſignment of the bail bond.

Upon this an application was made to the Court to ſet aſide the aſſignment of the bail-bond and ſubſequent proceedings thereon (if any) for irregularity, and alſo to order the bail-bond to be delivered up to be cancelled, on the ground of the Defendant having been charged in the cuſtody of the Warden of the *Fleet*, in this action, before the return of the writ. In ſupport of the application an affidavit was made, the object of which was to ſhew, that though no notice had been given to the Plaintiff of the Defendant having been charged in cuſtody, yet that he knew it at the time he took the aſſignment of the bail bond. This knowledge was on the part of the Plaintiff denied, and the fact remained doubtful.

Clayton Serjt. ſhewed cauſe, and relied on his affidavit, denying the knowledge of the Defendant's being in cuſtody when the aſſignment was taken, and alſo on the eſtabliſhed practice of the court requiring a notice of the ſurrender of the Defendant in all caſes before the proceedings of the Plaintiff can be affected by ſuch ſurrender.

Bayley Serjt., in ſupport of the rule, commented upon the affidavit, and inſiſted that if the Court ſaw that the Plaintiff was informed of the ſurrender, they would diſpenſe with the notice uſually required, the neceſſity for ſuch notice not exiſting in ſuch a caſe.

Lord

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Lord ALVANLEY Ch. J. seemed to think that the affidavits had brought home to the Plaintiff the knowledge of the Defendant's surrender previous to his taking an assignment of the bail-bond, and was therefore inclined to hold the notice unnecessary. But *Heath*, *Rooke*, and *Chambre* Js. were of opinion that the Court ought not to depart from the settled rule of practice, requiring a notice of the surrender; that rule having been established in order to preclude the necessity of deciding upon such contradictory affidavits as had been exhibited in the present case.

Accordingly *The Court* only stayed the proceedings upon payment of costs.

KENT v. HUSKINSON.

Nov. 19th.

A. having sent to *B.* a bale of sponge under a verbal order from the latter, for which he charged 11*s.* per pound; *B.* returned it, and at the same time wrote a letter to *A.* stating that he had examined the sponge, and finding that it was not worth more than 6*s.* per pound he had sent it back. Held that this letter did not amount to such an acceptance of the goods as would take the case out of the statute of frauds.

THIS was an action for goods sold and delivered, and was tried before Lord *Alvanley* Ch. J. at the *Westminster* sittings in this term, when the following circumstances appeared in evidence. The subject of the action was a bale of sponge sent by the Plaintiff, a wholesale dealer in that article, residing in *London*, to the Defendant, a retail dealer residing in *Staffordshire*. Some short time before the sponge was sent by the Plaintiff, he had been at the place where the Defendant resided, and had received from him a verbal order, under which he had acted in sending the sponge, and the price charged was 11*s.* *per* pound, amounting altogether to 75*l.* Soon after the sponge was sent, the Defendant wrote the following letter to the Plaintiff: "After receiving a letter from your house in town, stating the bale of sponge was sent by your direction, I called in a friend or two who are competent judges of the article, and asked them to say, according to the present price of sponge, what it was worth; the answer was, not more than six shillings *per* pound; have therefore returned it to you by the same conveyance it was forwarded by to this place. In future will select what sponge I may want personally, otherwise will appoint some confidential friend for that purpose." The Plaintiff's son being at the Defendant's house soon after the sponge was returned, was told by him that he had resolved not to keep the article, because it was not so good as he had expected. It was objected for the Defendant that inasmuch as this was a contract for the sale of goods of more than 10*l.* value, the case fell within the 17th section of the statute of

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frauds (*a*), for want of a note or memorandum in writing, and conſequently the Plaintiff could not recover. His Lordſhip being of this opinion, nonſuited the Plaintiff.

Shepherd Serjt. now moved to ſet aſide that nonſuit, and relied on the words of the 17th ſection of the ſtatute of frauds, which declares contracts for the ſale of goods void, "except the buyer ſhall accept part of the goods ſo ſold, or actually receive the ſame," within which exception he contended the preſent caſe fell, for that the object of the ſtatute was either that there ſhould be a contract in writing, or that ſome act ſhould be done by the party as evidence of his having received the goods; the latter of which objects he inſiſted was ſatisfied by what had taken place in the preſent caſe, for that though the Defendant had not accepted the bale of ſponge without any qualification or right reſerved to himſelf of diſputing the quality of the article ſent, yet within the meaning of the ſtatute, and with this reſerved right of diſputing the quality he had *accepted*, as was evidenced by his opening the bale and ſubjecting it to the examination of his friends. He urged that the Defendant by his conduct had affirmed the order previouſly given, and only denied that the order was well complied with, which was a matter for the conſideration of the jury, and obſerved that it was not within the letter or ſpirit of the ſtatute of frauds to hold that there muſt be a note or memorandum in writing of every ſale of goods where the vendee does not accept them abſolutely and in ſuch a way as to preclude himſelf from returning them in any caſe.

Lord ALVANLEY Ch. J. At the trial I thought, and ſtill continue of opinion, that the evidence does not take this caſe out of the ſtatute of frauds. How is any judgment to be formed as to the nature of the contract between theſe parties? Poſſibly the order was for the beſt, poſſibly for the ſecond beſt ſponge, or ſponge of ſome peculiar quality; all which circumſtances are left in a ſtate of uncertainty. It was this very uncertainty, and the frauds to which it might lead, that the ſtatute had in contemplation and meant to guard againſt. The only affirmance of any contract to be collected from the evidence is an affirmance of ſome ſort of order for ſome ſort of ſponge, and it appears that the moment the article reached the Defendant and was examined, he ſent it back to the Plaintiff,

(*a*) 29 *Car.* 2. *c.* 3.

ſaying it was not that ſort of ſponge which he wanted and had ordered. The Defendant's letter cannot, as it appears to me, be conſtrued into any thing like an acceptance, ſo as to bring this caſe within the exception which has been relied on.

HEATH J. I think my Lord was perfectly right in his conſtruction of the ſtatute, and in the opinion which he formed of the evidence relied on by the Plaintiff in this caſe, with a view to bring it within the exception. According to the words of the ſtatute, the exception does not apply, unleſs the vendee both receive and accept. Now that acceptance I cannot conſider to be any other than the ultimate acceptance, and ſuch as completely affirms the contract. What the nature of this order was, or under what circumſtances it was given, was not proved. Poſſibly the ſponge was ſent down upon ſpeculation only.

ROOKE J. I am of the ſame opinion. It does not appear to me that there was ſuch an acceptance by the Defendant as has been contended.

CHAMBRE J. The caſe appears to me to be too clear to require any further obſervation. Certainly there was no acceptance of the goods by the Defendant, unleſs we can conſider a refuſal to accept as amounting to an acceptance.

Shepherd took nothing by his motion.

BRAND and HERBERT *v.* BOULCOTT.

Nov. 20th.

INDEBITATUS aſſumpſit for money paid, laid out, and expended to the uſe of the Defendant. The cauſe was tried before Lord *Alvanley* Ch. J. at the *Guildhall* ſittings after laſt *Trinity* Term.

A., *B.*, and *C.* being appointed aſſignees under a commiſſion of bankrupt, and having acted as ſuch, *A.* and *B.* pay each half of his bill to the ſolicitor. Held that *A.* and *B.* could not maintain a joint action againſt *C.* for his proportion of the money paid, but muſt each bring a ſeparate action.

The Plaintiffs having ſued out a commiſſion of bankrupt againſt *T. L.* as joint petitioning creditors, were choſen aſſignees under that commiſſion together with the Defendant; and both the Plaintiffs and the Defendant acted as aſſignees under the commiſſion. Each of the Plaintiffs paid to the ſolicitor under the commiſſion the ſum of 104*l.* in diſcharge of his bill for expences incurred on account of the bankruptcy, and the preſent action was brought to recover the Defendant's proportion of the 208*l.* paid by the Plaintiffs. It was objected at the trial that ſeparate actions ought to have been brought by each of the Plaintiffs for contribution from the Defendant.

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fendant. Lord *Alvanley* being of this opinion nonſuited the Plaintiffs.

A rule *niſi* having been obtained on a former day for ſetting aſide this nonſuit,

Shepherd Serjt. now ſupported the rule. This caſe differs materially from that of an action for contribution by two out of three co-obligors of a bond; there, if two pay the debt, each muſt ſue ſeparately for his ſhare againſt the third; for as between themſelves they are never jointly liable. But where three perſons are in partnerſhip, and two pay a partnerſhip debt, the third is not liable to each ſeparately, but to the partnerſhip; thus, if three perſons agree to enter into partnerſhip, and bring into the joint fund 1000 *l.* each, and two advance 1000 *l.* each, but the third advances nothing, he will be liable to the partnerſhip to that amount, and not to each of the partners. So in this caſe, the 208 *l.* was due to the Plaintiffs jointly, and not 104 *l.* to each ſeparately; therefore the action was properly commenced by both for the whole ſum.

Bayley Serjt. *contrà*. If the rule contended for be juſt, it muſt equally hold good where two partners have advanced money for a third in unequal proportions. Now ſuppoſe one partner to have advanced 5000 *l.* and another only 5 *l.*, and a third, who has advanced nothing, to have a debt againſt the former to a large amount, if the two may owe the third who has advanced nothing for his proportion of 5000 *l.* and 5 *l.* jointly, the Defendant will be deprived of his ſet-off. Where two perſons have each advanced money for a third, there is no doubt that they may ſue ſeparately; and if they may alſo ſue jointly, it will put it in their power to defeat the ſet-off of the Defendant, by ſuing jointly if his croſs-demand be ſeparate, and ſeparately if his croſs-demand be joint.

The Court were of opinion that the Plaintiffs could not maintain a joint action, and therefore the nonſuit ought to ſtand.

Rule diſcharged.

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SOUTHEY and Another, Assignees of KEEVES a Bankrupt, *v.* BUTLER.

Nov. 20th.

A trader, subsequent to an act of bankruptcy, being arrested and detained in prison at the suit of several creditors, sent for all his creditors but one, and paid their debts in full; but no other circumstance occurred from which it could be presumed that they knew of his bankruptcy or insolvency. Held that such payments were not protected by the 19 *Geo.* 2. *c.* 32.

THIS was an action for money had and received, brought with a view to contest a payment made by the bankrupt to the Defendant under the following circumstances.

On the 1st of *September* 1801, which was subsequent to an act of bankruptcy committed by *Keeves*, he was arrested in an action at the suit of the Defendant, and committed to the *King's Bench* prison; after this he was removed to the *Fleet*, charged with this and several other actions. On the 2d of *October* following he sent for all the persons at whose suit he was detained except one *Hiam Hart*, and paid them all, including the present Defendant, the full amount of their debts, and was discharged from their several suits; but no other circumstance occurred from which it could be presumed that the Defendant knew of the bankruptcy or insolvency of *Keeves* at the time when he received his debt. On the 4th of *February* 1802 a commission of bankrupt issued against *Keeves*, and on the 16th of the same month he was discharged generally from the *Fleet*.

The cause was tried before Lord *Alvanley* Ch. J. at the *Guildhall* sittings after last *Trinity* Term, when the jury, under his Lordship's direction, found a verdict for the Plaintiffs.

A rule *nisi* for setting aside this verdict having been obtained on a former day,

Shepherd and *Bayley* Serjts. now supported the rule. This is a payment protected by the 19 *Geo.* 2. *c.* 32. which declares that payments made in the usual and ordinary course of trade and dealing, received by the creditor before notice of the bankruptcy or insolvency, shall be deemed valid, though in fact subsequent to an act of bankruptcy committed. By the case of *Cox* v. *Morgan*, *ante*, vol. 2. p. 398. it was decided that payments under legal process are within the protection of this statute. Now the present case falls within the same principle. The payment was made by the bankrupt in order to liberate himself from custody; and whether that were done to prevent an arrest in his own house, or discharge himself from actual confinement, can make no difference. If it be objected that he had no right to send for his creditors, it

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may be anſwered, that when once committed to priſon he has no other mode of obtaining his diſcharge; nor is his act more voluntary if he ſend for his creditors and pay them in order to get out of priſon, than if he pay them to prevent an arreſt. Both payments are made to avoid the inconvenience of confinement. The tranſaction between the bankrupt and his creditors in priſon by no means afforded evidence to them that he was in inſolvent circumſtances: for they did not know but that he was paying all his creditors; and it would be a ſingular inference to make, that becauſe a man ſent for his creditors and paid their debts in full he muſt be in inſolvent circumſtances. The conduct of the Defendant afforded no more evidence of his knowledge of the bankrupt's inſolvency than that of any other creditor who obtains his debt by an arreſt. It may perhaps be urged, that as that was not paid, a fraudulent preference was given to the other creditors. But if one creditor by uſing legal diligence obtain payment of his debt, ſuch payment will be protected, though it operate to the prejudice of the others; and the bankrupt's knowledge of his own ſituation will not prevent ſuch creditor from retaining it under the proviſions of the ſtatute, if he himſelf were ignorant of the inſolvency or bankruptcy of his debtor.

Beſt Serjt. *contrà*, was ſtopped by the Court.

Lord ALVANLEY Ch. J. The only queſtion to be conſidered is, Whether this caſe falls within the deciſion of this Court in *Cox* v. *Morgan*? Without entering into any examination of the principles upon which that deciſion proceeded, it is perfectly clear that the only rule there laid down was, that if a man who is arreſted by a creditor *bonâ fide* uſing legal diligence for the recovery of his debt pay that debt in order to relieve himſelf from that arreſt, and without any intention of giving a preference to the creditor by whom he is arreſted, ſuch payment will be protected by the 19 *Geo.* 2. The preſent caſe, however, goes much beyond that of *Cox* v. *Morgan*. The queſtion here is, Whether a man who has been charged in cuſtody at the ſuit of ſeveral creditors, and detained in priſon for a conſiderable time, may, whenever he thinks proper, ſend for ſome of thoſe creditors and pay their debts, leaving the reſt of the creditors unſatisfied; even though ſuch a payment has not the effect of diſcharging him from priſon? If this were to be conſidered within the protection of the ſtatute, it would afford

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to a bankrupt the means of giving that preference to favourite creditors which it is the object of the bankrupt laws to prevent.

HEATH J. The case of *Cox* v. *Morgan* is not applicable to this. The present is a clear case of undue preference.

ROOKE J. The case of *Cox* v. *Morgan* was decided on the special circumstances there stated. It was thought by more than one of the Court in that case, that the facts afforded ground from which it might have been inferred that the creditor knew of the insolvency of the bankrupt; but it was expressly stated in the case that he did not know of the insolvency or bankruptcy, and upon that ground the decision proceeded. In this case the bankrupt, being in prison, sends for a certain number of his creditors and pays them, omitting one at whose suit also he was charged in custody. Could a jury then have said that the creditors knew nothing of the distressed circumstances of the bankrupt? It appears to me to be a clear case of illegal preference.

CHAMBRE J. I am entirely of the same opinion. If we were to decide that the present payment is protected by the 19 *Geo.* 2. we might as well repeal the whole system of the bankrupt laws.

Rule discharged.

CLEGG and Another v. COTTON.

Nov. 22.

ASSUMPSIT by the indorsee against the drawer of a bill of exchange, dated the 24th of *September* 1794, and drawn at *Charlestown* in *America*, upon one *Michael Cullen* of *Liverpool*, in favour of Messrs. *Miller* and *Robertson* of *Charlestown*, for 500*l.*, payable 90 days after sight. The cause was tried before *Chambre* J. at the last summer assizes at *Lancaster*, when the Plaintiffs were nonsuited under the following circumstances.

The bill in question having been indorsed by *Miller* and *Robertson* to the house of *Booth* and Co. in *America*, and by them to one *James Jacks*, also in *America*, was by him indorsed to the Plaintiffs, who were merchants at *Manchester*. *Cotton*, the drawer of the bill, was the agent of *Cullen*, the drawee, in *America*, and drew this bill in favour of *Miller* and *Robertson*, for goods purchased by him there. Soon after the bill was drawn, *Cotton* having returned, *C.* undertaking to restore the same whenever it should appear that he was exonerated from the bill. Acceptance and payment of the bill were refused, but no notice was given to *A.* Held that *A.* was discharged.

A., the agent in *America* of *B* in *England*, drew a bill upon him, and indorsed it to *C.*, also residing in *America*, who indorsed it over. Before the bill became due, *A.* having reason to believe that *B* would fail, lodged property belonging to *B.* in the hands of *C.* to answer the bill in case it should be re-

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ſon to believe that *Cullen* was likely to become bankrupt, and fearing that the bill would be diſhonoured, lodged property in the hands of *Miller* and *Robertſon*, and *Booth* and Co., to anſwer the bill, in caſe it ſhould be returned; who gave him the following acknowledgment:

"We do acknowledge to have received from Mr. *L. Cotton*, the ſum of 2510 dollars, 55 cents, which we promiſe to hold forthcoming to him or his order, whenever it ſhall appear that we are exonerated from the payment of his bill for 500*l.* drawn by him on Mr. *Cullen* of *Liverpool*, in favour of *Miller* and *Robertſon*, and by us indorſed.

"19th *June* 1800. Miller and Robertſon.
"B. Booth and Co."

The bill was duly preſented for acceptance and payment, both which were refuſed, but no notice of ſuch refuſal was given to the drawer. The Defendant being arreſted upon the bill at *Liverpool*, ſaid that he ſhould apply to the aſſignees of *Cullen* to bail him, for that he had lodged property in *America* to anſwer the bill, which property, if he ſhould be diſcharged on account of the want of notice, he ſhould pay over to the eſtate of *Cullen*.

A rule *niſi* for ſetting aſide the nonſuit having been obtained on a former day in this term,

Cockell Serjt. now ſhewed cauſe. The only queſtion in this caſe is, whether any thing has been done to wave that want of notice of the non-acceptance and non-payment which was admitted at the trial. Now there ſeems to be nothing to diſtinguiſh this from the common caſe in which the drawer is diſcharged for want of notice: indeed it appears moſt clearly that the drawer had effects in his hands, and that if the bill had been preſented in *America*, it would have been paid.

Shepherd Serjt. in ſupport of the rule. The ſpecial circumſtances of this caſe take it out of the ordinary rule applicable to caſes where no notice has been given of non-acceptance or non-payment. The bill was drawn in *America*, and the drawer was at that time acting as the agent of the drawee. Now the converſation which took place at the time of the arreſt ſhews that the money which he lodged with the houſes of *Miller* and *Robertſon*, and *Booth* and Co., was the money of his principal, and that in conſequence of his having heard that the drawee was likely to fail, inſtead of remitting thoſe

effects

effects to him which might have provided for the payment of the bill, he retained them in *America* to indemnify the indorſees. This is the only inference to be drawn from the Defendant's obſervation, that he ſhould not pocket the money himſelf, but pay it over to the aſſignees of the drawee. The bill therefore was drawn upon a perſon to whom the effects afterwards detained in *America* were to have been remitted as a fund for the payment of that bill; and if ſo, the ſame rule muſt apply as if the bill had been drawn upon a perſon having no funds. Poſſibly the circumſtance of the funds being detained in *America* was the reaſon why acceptance was refuſed. If the money which was deſtined for the payment of the bill was kept back by the drawer in order to ſecure himſelf and the other indorſees in *America*, it cannot be contended that the drawer has ſuſtained any injury from the want of that notice which he now ſets up as a defence to this action upon the bill.

Lord ALVANLEY Ch. J. If I underſtand this caſe it is neither more nor leſs than this. The agent of *Cullen* in *America* having authority to draw upon him in *England*, drew the bill in queſtion: but from an apprehenſion that it might not be paid, he afterwards lodged money by way of indemnity in the hands of *Miller* and *Robertſon*, and *Booth* and Co., who were indorſees for a valuable conſideration. It does not appear whether he had this money at the time when the bill was drawn, or whether he knew that it would not be paid; nor is there any evidence to ſhew that the bill was not to be paid unleſs the money was remitted from *America*. That fact has been aſſumed in argument in order to bring this caſe within the rule which has been adopted, that want of notice to the drawer ſhall not effect the right of the holder where there are no effects of the drawer in the hands of the acceptor. I lament that ſuch a rule ever was adopted, and think it would have been better to have adhered to the old rule that want of notice diſcharged the drawer, without permitting parties to enter into the reaſons why the drawer was not entitled to ſuch notice. The utmoſt extent to which the deciſions have gone, is, that a man who draws a bill without having any effects in the hands of the drawee, ſhall not be permitted to object to the want of notice of non-acceptance or non-payment. Is that the caſe here? The preſent bill was drawn by an agent upon his principal, and when acceptance was refuſed, the Plaintiff ſhould have given notice thereof to the drawer. Clearly when the bill was drawn, the drawer was entitled to notice. Now

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ſhall he, becauſe after that time he depoſited money in the hands of *Miller* and *Robertſon*, and *Booth* and Co., to indemnify them againſt the return of the bill, be held to be deprived of that right to notice which he had when the bill was created? The want of notice might have induced *Miller* and *Robertſon*, and *Booth* and Co., to pay back the depoſit to the drawer, and the drawer might have paid it over to the drawee. There is nothing in this caſe from which fraud can be inferred; now it is on the ground of fraud that the Courts have proceeded in diſpenſing with notice. The Defendant being now ſued in his character of drawer, I think he has a right to avail himſelf of the want of notice. There is nothing in this caſe to bring it within the deciſion in *Bickerdike* v. *Bollman* (*a*), and I am not willing to extend the principles of that deciſion.

HEATH J. I am of the ſame opinion. No doubt the rule diſpenſing with notice proceeds on the ground of a ſuppoſed fraud. But that ground is not applicable to a caſe where an agent draws upon his principal, unleſs under very particular circumſtances. Had this bill been remitted to *America* immediately, it would probably have been paid out of the fund placed in the hands of *Miller* and *Robertſon*, and *Booth* and Co.

ROOKE J. No ſufficient reaſon has been aſſigned why notice was not given in this caſe. The Plaintiff only endeavours to ſupport his own laches by ſaying, if notice had been given, it would have been of no conſequence. It does not clearly appear that all the money paid into the hands of *Miller* and *Robertſon*, and *Booth* and Co. is to be paid over to the aſſignees of the drawee, for poſſibly it may be ſubject to demands which the Defendant may have upon the eſtate of *Cullen*, as his agent.

CHAMBRE J. I ſee no reaſon for changing the opinion which I formed at the trial. It is not neceſſary to ſay whether the rule which diſpenſes with notice in caſes where the drawer has no effects in the hands of the drawee were wiſely adopted or not. That rule certainly proceeds upon the ground of fraud in the drawer: and the courts have ſaid that where the drawer has been guilty of fraud he ſhall not claim the protection of thoſe rules which were introduced for the benefit of drawers acting *bonâ fide*. When a perſon draws a bill upon another who has no effects in his hands, he is not intitled to notice of its being diſhonoured, ſince he muſt

(*a*) 1 *T. R.* 405.

know

know without ſuch notice that no funds have been provided to anſwer it. In the preſent caſe there is no pretence to charge the drawer with fraud. The Defendant drew upon *Cullen* in the character of agent, and no evidence has been adduced to ſhew that he had not a right to do ſo. It has been aſſumed for the purpoſe of the argument that he was to ſend over money to anſwer the bill. It is true that the drawee had effects in *America*; and that before the drawer knew what was become of the bill, he had reaſon to apprehend that it might probably be returned upon the indorſers. In conſequence of this apprehenſion he depoſited effects with the indorſers by way of indemnity, and I think it cannot be diſputed that thoſe effects belonged to the drawee, and that they were depoſited for the purpoſe of paying the bill. Now in what right did the drawer depoſit theſe effects? So long as he himſelf or the indorſers remained liable upon the bill, he had a right to retain effects to the amount of the bill againſt the aſſignees of *Cullen*, or to protect the indorſers by the application of that property; but the moment that by the laches of the holder he and all the indorſers were diſcharged, his right to diſpoſe of the property ceaſed, and he was bound to transfer it immediately to the aſſignees of *Cullen*. The acknowledgment of *Miller* and *Robertſon*, and *Booth* and Co., was to this effect: for they engage to return the depoſit as ſoon as they ſhould be exonerated from the payment of the bill. Now they were exonerated at the ſame time that the Defendant was exonerated: and conſequently from that moment the money depoſited belonged to the aſſignees of *Cullen*. The Defendant in ſaying that he intended to pay over the money to the aſſignees of *Cullen*, expreſſed his intention of doing nothing more than the law would have compelled him to do: for the law would have obliged him to account with the aſſignees. I think therefore that he was well adviſed in reſiſting the action upon this bill, for had he paid the amount after he had been once diſcharged by want of notice, he might poſſibly have been compelled to pay the money over again to the aſſignees of *Cullen*. (*a*)

Rule diſcharged.

(*a*) See *Whitfield* v. *Savage*, *ante*, vol. 2. p. 277. But in that caſe the indorſer, who had been furniſhed with money to anſwer the bill, paid over that money to the holder, notwithſtanding an intimation from the drawer to refuſe payment on account of the want of notice of non-payment by the acceptor.

1802.

Nov. 25th.

BORROWDALE v. HITCHENER.

If a verdict for a plaintiff be taken at *Nisi Prius*, subject to the award of an arbitrator, and the rule of reference be made a rule of court, the verdict may be entered according to the award of the arbitrator, without any application to the Court for that purpose. If in such case the award be made before the term, the Defendant can only impeach it within the four first days of term. Personal service of the award is not necessary to warrant the issuing of execution in such case, if the attorney of the Defendant has been served with the award.

IN this case the parties having agreed at *Nisi Prius*, that a verdict should be taken for the Plaintiff for 150*l.* damages and 40*s.* costs, subject to the award of an arbitrator, to whom all matters in difference were referred, with a proviso that the arbitrator should make his award by the 1st day of this term, and the arbitrator having accordingly before the term made his award in favour of the Plaintiff for 113*l.*, and the rule of reference having been made a rule of court, the verdict was reduced according to the award, and judgment was entered up by the Plaintiff for that sum, together with his taxed costs, without any previous application to the Court for that purpose, and a writ of execution was sued out and executed. On a former day a rule *Nisi* was obtained by the Defendant, calling on the Plaintiff to shew cause why the writ of execution issued and the levy made thereon by the sheriff should not be set aside for irregularity with costs. The grounds of this application were; 1st, that the Plaintiff was not at liberty to reduce the verdict according to the award, without an express application to the Court for that purpose, and that he was premature in entering up his judgment before the end of the term. 2dly, That the execution was irregular, because the Defendant had never had personal notice of the award. The facts of the case as to the last point were, that the Defendant before the award made went into *Scotland*, and had not returned since; but it appeared that his attorney had been served with notice of the award, and had received a copy of the same.

Shepherd and *Bayley* Serjts. shewed cause, and insisted that where a verdict is taken at *Nisi Prius*, subject to the award of an arbitrator, the functions of the jury are thereby vested in the arbitrator; and when he has ascertained the sum due, the verdict may be altered accordingly, and the judgment entered thereon, without any other interference of the Court than that of making the rule of reference a rule of court; in support of this proposition they referred to *Grimes* v. *Naish*, *ante*, vol. 1. p. 480, and *Lee* v. *Lingard*, 1 *East* 401. (*a*) They observed that if it were otherwise, a Plaintiff consenting to a reference, and taking a verdict for his security,

(*a*) But see *Kettle* v. *Grove*, *Barnes*, 57. where the Court approved a contrary practice, saying "Plaintiff had not a right to enter judgment without leave of the Court."

would be in a worſe condition than if he abided the deciſion of the jury; whereas the object of taking a verdict was to place him in the ſame condition as if he obtained a verdict. With reſpect to the 2d objection, they contended that perſonal ſervice was only neceſſary in order to bring a party into contempt, whereas the proceedings againſt the Defendant were not of that nature, but mere civil proceſs founded on the judgment obtained by the Plaintiff.

Beſt Serjt. *contrà*, admitted that the caſes of *Grimes* v. *Naiſh*, and *Lee* v. *Lingard*, were an anſwer to the 1ſt part of his 1ſt objection, but inſiſted that according to the words of the 9 & 10 *W.* 3. *c.* 15. *ſ.* 2. "any arbitration or umpirage made under a rule of reference might be ſet aſide by the Court upon application made within the term immediately following the publication of the award," and conſequently the Plaintiff had no right to enter up his judgment and proceed to execution till the expiration of the term, as the Defendant would thereby be precluded from applying to the Court to ſet aſide the award. He alſo referred to *Read* v. *Garnett*, *Barnes* 58. to ſhew that where a Plaintiff takes a verdict for ſecurity, and refers the cauſe at *Niſi Prius*, the Court of Common Pleas had held that an affidavit of the due execution of the award, and of a demand of the money, is as neceſſary where the application is to have the *poſtea* delivered to the Plaintiff, in order that he may take out execution, as where the application is for an attachment.

Lord ALVANLEY Ch. J. It appears to me that the preſent application to the Court is without any foundation in reaſon. By conſent of the parties an arbitrator is at *Niſi Prius* ſubſtituted in the place of the jury, and when his award is made the verdict muſt of courſe be entered ſo as to correſpond with that award. It is not pretended that the Defendant was not informed of the arbitrator having made his award; but it is contended that he ought to have had perſonal ſervice previous to the execution. But that I conceive to be perfectly unneceſſary as a foundation for civil proceſs. The 9 & 10 *W.* 3. does not apply to ſuch a caſe as this. If therefore the Defendant wiſhed to impeach the verdict as founded on the award, he ſhould have applied to the Court for that purpoſe within the four firſt days of term.

HEATH J. The 9 & 10 *W.* 3. has no operation in this caſe. With reſpect to the caſe cited from *Barnes*, that has been overruled by ſubſequent authorities and practice; indeed many of the caſes reported in that book are not law.

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ROOKE J. There can be no doubt that the 9 & 10 *W.* 3. does not apply to an award made under a ſubmiſſion of this kind. The award of the arbitrator is the verdict of the jury, and if that is not ſatisfactory the party aggrieved ſhould come to the court as in other new trials within the four days. The reaſon upon which the deciſion in *Read* v. *Garnett* is founded proves it to be a caſe of no authority; for a demand of the money is there ſaid to be as neceſſary before execution is taken out, as it would be in moving for an attachment. Now the former is civil, the latter criminal proceſs.

CHAMBRE J. The limitation of time reſerved in 9 & 10 *W.* 3. is for the party to apply to the equity of the Court. But the preſent judgment and execution are founded on a verdict. Perſonal ſervice is only neceſſary in caſes of criminal proceſs, and not in caſes of civil proceſs. Rule diſcharged with coſts.

Nov. 26th.

COLLETT v. THOMPSON.

In an action of *aſſumpſit* for non-performance of a contract for the ſale of a houſe, with counts to recover back the depoſit, the plaintiff having in his firſt count alleged that the Defendant, who was to make a good title, had delivered an abſtract which was "inſufficient, "defective, "and objec- "tionable," the Court obliged the Plaintiff to give a particular of all objections to the abſtract ariſing upon matters of fact.

THIS was an action brought to recover damages for the breach of an agreement for the ſale of a houſe and a ſum of money paid by way of depoſit on the purchaſe of the premiſes. The 1ſt count was *in aſſumpſit* on the agreement to ſell; and after alleging that the Defendant was to make a good title to the premiſes, ſtated in the breach that he delivered an abſtract of title which was inſufficient, defective, and objectionable, and that the premiſes were liable to incumbrances. There was alſo a count for money had and received.

A rule *Niſi* having been obtained on a former day, calling on the Plaintiff to ſhew cauſe why he ſhould not deliver to the Defendant's attorney an account in writing of the inſufficiencies, defects, and objections to the abſtract delivered, and alſo of the incumbrances to which the premiſes were in the declaration alleged to be ſubject;

Shepherd Serjt. now ſhewed cauſe, and contended that the Court would not entertain this application, which was in the nature of a bill in equity, without any mutuality in the advantages to be derived under it, for that if the objections already within the Plaintiff's knowledge ſhould be ſtated by way of particular, and previous to the trial it ſhould be diſcovered that other objections exiſted,

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the Plaintiff would not be able to avail himself of them, but would be precluded by the particular. He observed that the abstract had been returned to the Defendant's attorney, with marginal notes pointing out as objections that two annuities, creating a charge upon the premises, had not been accounted for, and that an inspection of some deeds having been required, the Plaintiff had only been referred to a third person, in whose possession they were. The objections noted in the margin of the abstract were, he insisted, sufficient notice to the Defendant; and the application to a third person for the inspection of deeds, was not for the party purchasing, but the party selling, to make.

Best Serjt., *contrà*, observed that this, like other applications for particulars of a Plaintiff's demand, was only to prevent surprise, and was made necessary by the generality of the allegations in the Plaintiff's declaration; that it fell within the principles acted upon in the King's Bench, where in ejectments for re entry under breaches of covenant, the Plaintiff had been compelled to specify the breaches upon which he meant to rely (*a*), and that it was warranted by an opinion thrown out in this court some few terms back in a case of *M'Connell* v. *Hector*, where on an issue from the Court of Chancery to try a question of bankruptcy, and an application for a particular of the acts of trading meant to be relied on, the Court held it a reasonable application (*b*).

The Court were of opinion that the Plaintiff was not bound to state in his particular any of the objections in point of law arising upon the abstract delivered, but that he ought to specify every matter of fact which he meant to rely upon at the trial, as having been a cause of his not being able to complete the purchase. Accordingly with this qualification they made the

Rule absolute.

(*a*) *Doe d. Birch* v. *Phillips*, 6 T. R. 597.
(*b*) *Nisi*; This intimation was thrown out in that case on the rule *Nisi*, which was afterwards abandoned.

WENNALL v. ADNEY.

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ASSUMPSIT to recover the amount of a surgeon's bill. The cause was tried before *Le Blanc* J. at the last *Shrewsbury* assizes, when it appeared that the action was brought to recover

A master is not liable upon an implied *assumpsit* to pay for medical attendance on a servant who has met with an accident in his service

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8*l.* 18*s.* 6*d.* the amount of a bill for medical attendance upon a ſervant of the Defendant, who had his arm broken while driving the Defendant's team, and who had been hired by the Defendant at the yearly wages of 3*l.* 10*s.* and victuals; that the accident happened nearer the houſe of the ſervant's mother than that of the Defendant, and that he was taken to his mother's houſe; that the accident happened in one pariſh, that the houſe of the ſervant's mother was ſituated in another, and the Defendant's in a third; that the Plaintiff, who was the ſurgeon uſually employed by the Defendant, accidentally paſſing near the mother's houſe, was called in and deſired to attend her ſon; at which time nothing was ſaid about the Defendant paying for his attendance, but the mother obſerved that ſhe had always been able to pay her way, and hoped ſhe ſhould do ſo ſtill; that during the time of the ſervant's confinement he was ſupplied with victuals from the Defendant's houſe; that the Plaintiff firſt delivered his bill to the Defendant, but afterwards called a meeting of the pariſhioners of the pariſh in which the mother's houſe was ſituated, and ſubmitted it to them for payment, who refuſed to diſcharge it. The learned Judge being of opinion that the Defendant, not having employed the Plaintiff, or made any promiſe of payment, was not liable, nonſuited the Plaintiff.

A rule *Niſi* having been obtained for ſetting aſide this nonſuit,

Bayley Serjt. ſhewed cauſe. The Defendant in this caſe having entered into no expreſs contract with the Plaintiff for the cure of the ſervant, the queſtion will be, Whether a maſter be ſo far bound to pay for medical aſſiſtance if his ſervant meet with an accident in his ſervice, that the law will imply a contract ſo as to charge him? It is true that in the caſe of *Scarman* v. *Caſtell*, 1 *Eſp. N. P. Caſ.* 270. Lord *Kenyon* held that an apothecary might recover from a maſter the amount of a bill for medicine and attendance furniſhed to and beſtowed upon his ſervant; but it may be obſerved, although it does not appear in the report, that the apothecary in that caſe attended the ſervant in the houſe of the Defendant, who was a man of large fortune, and though not expreſsly employed by the Defendant, he might infer from the circumſtance of his being ſent for to the Defendant's houſe that he was to be paid by the Defendant. In *Newby* v. *Wiltſhire*, which is printed in 2 *Eſp. N P.* 739. Lord *Mansfield* ſays, "I think in general a maſter ought to maintain his ſervants and take care of them in ſickneſs;

but the queſtion now is, What is the law?" There the action was brought by the overſeer of the pariſh againſt the Defendant for money laid out in the cure of a ſervant of the Defendant, who had met with an accident in the Defendant's ſervice, and it was held that the Plaintiff was not entitled to recover. There is alſo a caſe of *Simmons* v. *Wilmot*, 3 *Eſp. N. P. Caſ.* 91. in which Lord *Eldon* held that the Plaintiff, who had taken into his houſe and paid for the cure of the ſervant of a third perſon, might recover againſt the officers of the pariſh were the accident happened, the maſter not having reſided in that pariſh, and the pariſh officers being liable to provide for caſual poor.

Williams Serjt. in ſupport of the rule. In *Simmons* v. *Wilmot*, Lord *Eldon* recognizes the doctrine laid down by Lord *Kenyon* in *Scarman* v. *Caſtell*, and though the pariſh officers in that caſe were held liable, yet a diſtinction was taken between weekly ſervants and thoſe hired for a longer period, the ſervant in that caſe being of the former deſcription. The deciſion in *Scarman* v. *Caſtell* was acquieſced in, though the Defendant was well able to apply to the Court for a reviſion of that opinion had it been thought not to be maintainable. In *Dalton's Juſtice*, *c.* 58. p. 141. edit. 1742, it is ſaid, "If a ſervant, retained for a year, happen within the time of his ſervice to fall ſick, or to be hurt or lamed, or otherwiſe to become *non potens in corpore* by the act of God, or in doing his maſter's buſineſs; yet the maſter muſt not therefore put ſuch ſervant away, nor abate any part of his wages for ſuch time." The rule laid down by *Dalton* muſt extend to oblige the maſter to provide medical aſſiſtance; for it would be of little advantage to the ſervant to remain ſick in his maſter's houſe unleſs he were properly attended there and ſupplied with medicine. It is not neceſſary that the miſtreſs in this caſe ſhould have made an expreſs promiſe, for if ſhe were liable there was no need of a promiſe to bind her; and if ſhe were not liable, the promiſe would be *nudum pactum* (*a*).

This

(*a*) An idea has prevailed of late years that an *expreſs* promiſe, founded ſimply on an antecedent moral obligation, is ſufficient to ſupport an *aſſumpſit*. It may be worth conſideration, however, whether this propoſition be not rather inaccurate, and whether that inaccuracy has not in a great meaſure ariſen from ſome expreſſions of Lord *Manſfield* and Mr. Juſtice *Buller*, which, if conſtrued with the qualifications fairly belonging to them, do not warrant the concluſion which appears to have been rather haſtily drawn from thence. In *Atkins* v. *Hill*, *Cowp.* 288., which was *aſſumpſit* againſt an executor on a promiſe by him to pay a legacy in conſideration of aſſets, Lord *Manſfield* ſaid, "It is the caſe of a promiſe made upon a good and valuable conſideration which

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This appears from *Watſon* v. *Turner*, *Bull. N. P.* 147. where the overſeers of the poor were held liable to an apothecary for his attendance,

which in all caſes is a ſufficient ground to ſupport an action. It is ſo in caſes of obligations which would otherwiſe only bind a man's conſcience, and which without ſuch promiſe he could not be compelled to pay." And in *Hawkes* v. *Sanders*, *Cowp.* 290. which was a ſimilar caſe with *Atkins* v. *Hill*, Lord *Mansfield* ſaid that the rule laid down at the bar, "that to make a conſideration to ſupport an *aſſumpſit* there muſt be either an immediate benefit to the party promiſing or a loſs to the perſon to whom the promiſe was made," was too narrow; and obſerved, "that a legal or equitable duty is a ſufficient conſideration for an actual promiſe; that where a man is under a moral obligation, which no Court of law or equity can enforce, and *promiſes*, the honeſty and rectitude of the thing is a conſideration." His Lordſhip then inſtanced the ſeveral caſes of a promiſe to pay a debt barred by the ſtatute of limitations, a promiſe by a bankrupt after his certificate to pay an antecedent debt, and a promiſe by a perſon of full age to pay a debt contracted during his infancy. The opinion of Mr. Juſtice *Buller* in the laſt caſe was to the ſame effect, and the ſame law was again laid down by Lord *Mansfield* in *Trueman* v. *Fenton*, *Cowp.* 544. Of the two former caſes it may be obſerved, that the particular point decided in them has been over-ruled by the ſubſequent caſe of *Deeks* v. *Strutt*, 5 *T. R.* 690. And it may further be obſerved, that however general the expreſſions uſed by Lord *Mansfield* may at firſt ſight appear, yet the inſtances adduced by him as illuſtrative of the rule of law, do not carry that rule beyond what the older authorities ſeem to recognize as its proper limits; for in each inſtance the party bound by the promiſe had received a benefit previous to the promiſe. Indeed it ſeems that in ſuch inſtances alone as thoſe ſelected by Ld. *Mansfield* will an *expreſs* promiſe have any operation, and there it only becomes neceſſary, becauſe though the conſideration was originally beneficial to the party promiſing, yet, inaſmuch as he was not of a capacity to bind himſelf when he received the benefit, or is protected from liability by ſome ſtatute proviſion, or ſome ſtubborn rule of law, the law will not as in ordinary caſes *imply* an *aſſumpſit* againſt him. The ſame obſervation is applicable to *Trueman* v. *Fenton*, that being an action againſt a bankrupt on a promiſe made by him ſubſequent to his certificate reſpecting a debt due before the certificate. There is however rather a looſe note of a caſe of *Scott* v. *Nelſon*, *Weſtminſter* Sittings 4 *Geo.* 3. *cor.* Ld. *Mansfield* (ſee *Eſp. N. P.* 945.), in which his Lordſhip is ſaid to have held a father bound by his promiſe to pay for the previous maintenance of a baſtard child. And there is alſo an anonymous caſe, 2 *Show.* 184., where Lord Ch. J. *Pemberton* ruled that "for meat and drink for a baſtard child an *indebitatus aſſumpſit* will lie." Although the latter caſe does not expreſsly ſay that there was a previous requeſt by the Defendant, yet that ſeems to have been the fact, for Ld. *Hale's* opinion is cited to ſhew "that where there is common charity and a charge," the action will lie; which ſeems to imply that if a charge be impoſed upon one perſon by the charitable conduct of another, the latter ſhall pay; and though he adds "and undoubtedly a ſpecial promiſe would reach it," that expreſſion does not neceſſarily import a promiſe ſubſequent to the charge being ſuſtained, but may be ſuppoſed to mean that where a party is induced to undertake a charge by the engagement of another to pay, the latter will certainly be liable even though he ſhould not be ſo where the charge was only induced by his conduct without ſuch engagement. The caſe of *Watſon* v. *Turner*, *Bull. N. P.* 147. has ſometimes been cited in ſupport of what has been ſuppoſed to be the general principle laid down by Lord *Mansfield*, becauſe in that caſe overſeers were held bound by a mere ſubſequent promiſe to pay an apothecary's bill for care taken of a pauper; but it may be obſerved, that "this was adjudged not to be *nudum pactum*, for the overſeers are bound to provide for the poor;" which obligation being a legal obligation diſtinguiſhes the caſe. Indeed in a late caſe of *Atkins* v. *Banwell*, 2 *Eaſt.* 505. that diſtinction does not ſeem to have been ſufficiently adverted to, for *Watſon* v. *Turner*

tendance, though not ordered by them, and a ſubſequent promiſe by them to pay was ſaid not to be *nudum pactum*, becauſe they were bound by law to provide for the poor.

Lord

was cited to ſhew that a mere moral obligation is ſufficient to *raiſe* an implied *aſſumpſit*, and though the Court denied that propoſition, yet Lord *Ellenborough* obſerved that the promiſe given in the caſe of *Watſon* v. *Turner* made all the difference between the two caſes, without alluding to another diſtinction which might have been taken, viz. that though the pariſh officers were bound by law in *Watſon* v. *Turner*, the Defendants in the principal caſe were not ſo bound, becauſe the pauper had been relieved by the Plaintiffs as overſeers of another pariſh, though belonging to the pariſh of which the Defendants were overſeers. In the older caſes no mention is made of moral obligation; but it ſeems to have been much doubted whether mere natural affection was a ſufficient conſideration to ſupport an *aſſumpſit*, though coupled with a ſubſequent expreſs promiſe. Indeed Lord *Mansfield* appears to have uſed the term *moral obligation* not as expreſſive of any vague and undefined claim ariſing from nearneſs of relationſhip, but of thoſe imperative duties which would be enforceable by law, were it not for ſome poſitive rule, which, with a view to general benefit, exempts the party in that particular inſtance from legal liability. On ſuch duties, ſo exempted, an expreſs promiſe operates to revive the liability and take away the exemption, becauſe if it were not for the exemption they would be enforced at law through the medium of an implied promiſe. In ſeveral of the caſes it is laid down, that to ſupport an *aſſumpſit* the party promiſing muſt derive a benefit, or the party performing ſuſtain an inconvenience occaſioned by the Plaintiff; *per Coke* and all the Juſtices, *Hatch* and *Capel's* caſe, *Godb.* 203. *per Reeve* J. *Mar.* 203. *per Coke* Ch. J. and *Dodderidge* J. 3 *Bulſt.* 162. and *per Coke* Ch. J. *Roll. Rep.* 61. *pl.* 4. And in *Lampleigh* v. *Brathwaite*, *Hob.* 105. it was reſolved "that a mere voluntary curteſy will not have a conſideration to uphold an *aſſumpſit*. But if that curteſy were moved by a ſuit or requeſt of the party that gives the *aſſumpſit*, it will bind; for the promiſe, though it follows, is not naked, and couples itſelf with the ſuit before, and the merits of the party procured by that ſuit." And in *Brett* v. *J. S. and his Wife*, *Cro. Eliz.* 755., where the firſt huſband of the wife ſent his ſon to table with the Plaintiff for three years at 8*l. per ann.* and died within the year, and the wife during her widowhood, in conſideration that the ſon ſhould continue the reſidue of the time, promiſed to pay the Plaintiff 6*l.* 13*s.* 4*d.* for the time paſt, and 8*l.* for every year after, and upon which promiſe the Plaintiff brought his action; the Court held that natural affection was not of itſelf a ſufficient ground for an *aſſumpſit*; for although it was ſufficient to raiſe an uſe, yet it was not ſufficient to ground an action without an expreſs *quid pro quo*; but that as the promiſe was not only in conſideration of affection but that the ſon ſhould afterwards continue at the Plaintiff's table, it was ſufficient to ſupport a promiſe. In *Harford* v. *Gardiner*, 2 *Lee.* 30. it was ſaid by the Court, that love and friendſhip are not conſiderations to found actions upon, and in *Beſt* v. *Jolly*, 1 *Sid.* 38. where a father was held liable for his own and his ſon's debt, becauſe he had promiſed to pay them if the Plaintiff would forbear to ſue for them, yet the Court ſaid, "he was not liable for his ſon's debt," but having induced forbearance, which is a damage to the Plaintiff, he was held liable, "though as to the ſon's debt it was no benefit to the Defendant." So in *Beſich* v. *Coggil*, *Palm.* 559. it was debated whether the Defendant was liable upon an expreſs promiſe to repay the Plaintiff money laid out by him in *Spain* for the Defendant's ſon, and the charges of his funeral, *Hyde* Ch. J. and *Whitelock* being of opinion that the action could not be maintained; *Jones* and *Dodderidge* *è contrà* that it could. The former of which it ſhould ſeem was the better opinion; for in *Butcher* v. *Andrews*, *Carth.* 416. on *aſſumpſit* for money lent

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Lord ALVANLEY Ch. J. I have reaſon to believe that the opinion delivered by Lord *Kenyon* in the caſe of *Scarman* v. *Caſtell*, was not a haſty opinion, but formed upon reflection. I have no difficulty,

by the Plaintiff to the Defendant's ſon at his inſtance and requeſt, and verdict for the Plaintiff, the judgment was arreſted, *Holt* Ch. J. ſaying, "if it had been an *indebitatus* for ſo much money paid by the Plaintiff at the requeſt of the Defendant unto his ſon, it might have been good, for then it would be the father's debt and not the ſon's; but when the money is lent to the ſon, it is his proper deot, and not the father's." But in *Church* v. *Church*, *B. R.* 1656, cit. Sir *T. Ray.* 260. where Defendant promiſed to repay the Plaintiff the charges of his ſon's funeral, the latter was held entitled to recover, though no requeſt was laid in the declaration. Of which caſe it may be obſerved, that poſſibly after verdict the Court preſumed a requeſt proved; for in *Hayes* v. *Warren*, 2 *Str.* 933. though the Court would not preſume a requeſt after judgment by default, yet they ſaid they would have preſumed it after verdict. However, in *Style* v. *Smith*, cited by *Popham* J. 2 *Leon.* 111. it was determined that if a phyſician in the abſence of a father give his ſon medicine, and the father in conſideration thereof promiſe to pay him, an action will lie for the money. But the caſe of *Style* v. *Smith*, if cloſely examined, will not perhaps be found ſo diſcordant with the principle laid down in *Brat* v. *J. S. and his Wife* as may be ſuppoſed. From the expreſſion "in the abſence of a father," uſed in that caſe, it may be inferred that the ſon lived with the father, and that the medicine was adminiſtered to the ſon in the houſe of the father, while the latter was abſent, from whence it reſults that the phyſician's debt, though not founded on any immediate benefit to the father, or on his requeſt, was moſt probably founded on his credit; which credit, if fairly inferred from circumſtances by the phyſician, might operate to charge the father in the ſame way as his requeſt would operate, the phyſician having ſuſtained a loſs in conſequence of that credit. Indeed if any of the caſes could be ſuſtained on the principle that a father is, by the mere force of moral obligation, bound to pay what has been advanced for his ſon, becauſe he has ſubſequently promiſed to pay it; by the ſame rule the ſon ſhould be liable for the debt of the father upon a ſimilar promiſe; for the ſame moral obligation exiſts in both caſes. Yet in *Barber* v. *Fox*, 2 *Saund.* 136. the Court arreſted the judgment in an action of *aſſumpſit* on a promiſe made by the Defendant, to avoid being ſued on a bond of his father, it not being alleged that the Defendant's father had bound himſelf and his heirs; for they refuſed to intend even after verdict that the bond was in the uſual form, and conſequently held the promiſe of the Defendant *nudum pactum*, he not appearing to have been liable to be ſued upon the bond. And this laſt caſe was confirmed in *Hunt* v. *Swain*, 1 *Lev.* 165. Sir *T. Ray.* 127. 1 *Sid.* 248. See note 2 to *Barber* v. *Fox*, by Mr. Serjt. *Williams*. Indeed it is clear from *Lloyd* v. *Lee*, 1 *Str.* 94. and *Cockſhott* v. *Bennett*, 2 *T. R.* 763. that if a contract between two perſons be *void*, and not merely *voidable*, no ſubſequent expreſs promiſe will operate to charge the party promiſing, even though he has derived a benefit from the contract. Yet according to the commonly received notion reſpecting moral obligations and the force attributed to a ſubſequent *expreſs* promiſe, ſuch a perſon ought to pay. An expreſs promiſe, therefore, as it ſhould ſeem, can only revive a precedent good conſideration, which might have been enforced at law through the medium of an implied promiſe, had it not been ſuſpended by ſome poſitive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or ſtatute proviſion. In addition to the caſes already collected upon this ſubject, it may be obſerved, that in *Mitchinſon* v. *Hewſon*, 7 *T. R.* 348. the Court of King's Bench, upon the authority of *Drue* v. *Thorn*, *Alt.* 72. held a huſband not liable to be ſued alone

difficulty, however, in saying, that I concur with the learned Judge before whom this cauſe was tried in thinking that the Defendant is not liable. The ſum in diſpute is only 8*l.* 18*s.* 6*d.*, and if a wiſh is entertained by thoſe whom this judgment may affect to obtain a more ſolemn deciſion upon this point, ſome opportunity ſhould be taken where a greater ſtake is in litigation. In this kind of queſtion much may depend upon the nature of the contract entered into between the maſter and the ſervant. Sometimes a maſter engages to ſupply his ſervant with neceſſary victuals, and it may undoubtedly be argued, that neceſſary victuals mean ſuch victuals as may ſuit the ſtate of health or infirmity in which the ſervant happens to be; as if a ſervant be in need of wine or victuals of that deſcription, which are given by way of medicine. It is ſufficient, however, to obſerve, that previous to the caſe of *Scarman* v. *Caſtell*, there is no authority in the law of *England* to be found which warrants the poſition contended for on the part of the Plaintiff. I have no doubt whatever that pariſh officers are bound to aſſiſt where ſuch accidents as theſe take place; and that the law will ſo far raiſe an implied contract againſt them as to enable any perſon who affords that immediate aſſiſtance which the neceſſity of the caſe uſually requires, to recover againſt them the amount of money expended.

HEATH J. I believe that the humanity of Lord *Kenyon* miſled him when he adopted the doctrine upon which he decided the caſe of *Scarman* v. *Caſtell*. Probably at the moment it occurred to him that if the maſter was not bound to provide medical aſſiſtance for his ſervant, the latter would be left wholly deſtitute: but I am perfectly ſure it is more for the advantage of ſervants that the legal claim for ſuch aſſiſtance ſhould be againſt the pariſh officers rather than againſt their maſters; for the ſituation of many maſters who are obliged to keep ſervants, is not ſuch as to enable them to afford ſufficient aſſiſtance in caſes of ſerious illneſs.

ROOKE J. The contract on the part of the ſervant is merely to ſerve; but on the part of the maſter it is varied by numberleſs ſtipulations, according to the inclinations of the contracting parties. I

alone for the debt of his wife, contracted before marriage, though the objection was only taken in arreſt of judgment, and conſequently a promiſe by him to pay the debt appeared upon the record. From whence this principle may be extracted, that an obligation to pay in one right, even though it be a legal obligation, and coupled with an expreſs promiſe, will not ſupport an aſſumpſit to pay in another right.

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cannot think, however, that without any ſtipulation to that effect, the maſter is liable to furniſh his ſervant with medicine; and indeed the paſſage from *Dalton* ſeems to point out the utmoſt extent of inconvenience to which the maſter is obliged to ſubmit in caſe of his ſervant's illneſs. If the general principle contended for by the Plaintiff were to be adopted as a rule of law, many perſons who are obliged, for the purpoſes of their trade, to keep a number of ſervants, would be unable to fulfil the duty impoſed upon them by the law. It muſt be left to the humanity of every maſter to decide whether he will aſſiſt his ſervant according to his capacity or not.

CHAMBRE J. The obligation of the maſter to provide medical aſſiſtance for his ſervant, if any, muſt ariſe from contract. It cannot be contended that a maſter impliedly contracts to furniſh his ſervant with all neceſſaries; for in ſome caſes he neither engages to furniſh cloaths nor victuals; and if not, he is not bound to provide either. What has paſſed at *Niſi Prius* upon this ſubject has been ſomewhat haſty; and I think the rule there laid down would be very diſadvantageous to the ſervants themſelves if it were adopted. The paſſage from *Dalton* does not appear to me to extend the legal obligation of the maſter in the way contended for; and except that paſſage there ſeems to be nothing but the modern *Niſi Prius* authorities from which any inference can be drawn in the Plaintiff's favour.

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Rule diſcharged.

If three partners (two of whom reſide abroad and one in *England*) be ſued for a partnerſhip debt, and the partner reſident in *England* appear to the action, but refuſe to appear for the partners reſident abroad, the ſheriff, under a *diſtringas* againſt the two partners, may take partnerſhip effects, tho' paid for by the partner reſident in *England* alone, to whom the partnerſhip was largely indebted: and the Court will not relieve him againſt ſuch diſtreſs.

MORLEY and Another, Aſſignees of PISTOR a Bankrupt, *v.* STROMBOM, HUDSON, and LOWRIE.

THIS was an application to the Court on the part of *Hudſon*, one of the Defendants, calling on the Plaintiffs to ſhew cauſe why the iſſues levied under a *diſtringas* againſt *Strombom* and *Lowrie*, the other two Defendants, ſhould not be returned to him, and in the mean time all proceedings be ſtayed.

The Defendants *Strombom* and *Lowrie*, (who were reſident at the *Cape of Good Hope*), together with *Hudſon* the other Defendant, who was reſident in *London*, carried on buſineſs in *London* under the firm of *Strombom*, *Hudſon*, and *Lowrie*. *Strombom* and *Lowrie* drew a bill upon their houſe in *London* in favour of the

bankrupt *Piſtor*, which was accepted by *Hudſon* in the name of the firm. The Plaintiff having brought an action upon this bill againſt the three Defendants, *Hudſon* entered an appearance for himſelf, but declined to appear for the other Defendants, alleging he had no authority ſo to do; the partnerſhip had no goods in this country except a deſk and the furniture of a counting-houſe, which had been paid for by *Hudſon*, to whom the partnerſhip was largely indebted. A writ of *diſtringas* having iſſued againſt *Strombom* and *Lowrie* for their non-appearance, and the ſheriffs being about to take away the deſk and furniture of the counting-houſe, *Hudſon* paid the value of them to avoid that inconvenience: but afterwards entered an appearance for the other Defendants, proteſting at the ſame time againſt the irregularity of the ſheriff's proceedings; upon which the money was reſtored to him under a judge's order. The Plaintiffs then proceeded to final judgment, and commenced an action on that judgment againſt the three Defendants, to which *Hudſon* appeared, but declined appearing for the otherDefendants; upon which another *diſtringas* iſſued, and the deſk and furniture of the counting-houſe were again taken, and *Hudſon* again paid the money, at the ſame time giving notice to the ſheriff to retain it in his hands.

Bayley Serjt. was proceeding to ſhew cauſe, when *Shepherd* Serjt. was called upon to ſupport his rule. He contended that under the *diſtringas* the ſheriff was not entitled to take any goods but thoſe in which *Strombom* and *Lowrie* had an intereſt, whereas they had no intereſt in the goods which had been ſeized under the *diſtringas*, inaſmuch as they were paid for by *Hudſon*, who was a creditor of the other two partners; that even under an execution againſt one of ſeveral partners, where the ſheriff ſeizes partnerſhip goods he can only retain the undivided intereſt, *Heydon* v. *Heydon*, 1 *Salk.* 392.; and in ſuch a caſe the Court of King's Bench have directed the Maſter to take an account of the ſhare of the partnerſhip effects to which the other partners were entitled, *Eddie* v. *Davidſon*, *Doug.* 650. That if any doubt could be entertained with reſpect to the power of the Court to interfere in a caſe of execution, there could be none in the caſe of a *diſtringas*, it being the daily practice of the Court to order iſſues to be reſtored where they have been improperly taken; that if the Plaintiff had applied to the Court for leave to ſell the iſſues he could not have been permitted ſo to do if the Court had been aware of the circum-

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ſtances of the caſe, and that what the Plaintiffs ought not to be permitted to ſell, they ought to be compelled to reſtore.

Lord ALVANLEY Ch. J. In this caſe, three perſons being in partnerſhip, one accepts a bill in the name of himſelf and the two others, upon which a joint action is brought againſt him and the two others in whoſe name and by whoſe authority he has accepted the bill. To this action the two partners not reſident in *England* having neglected to appear, the Plaintiff ſeeks to compel an appearance; the only two methods in which this can be done are by diſtraining on their property in *England*, if any can be found, which is the more ſpeedy proceſs, or by proceeding to outlawry, if no property can be found, which is the more circuitous proceſs. The Court will certainly be diſpoſed to favour the former. The ſheriff, being directed to take into his cuſtody the property of theſe two partners, ſeizes certain goods in the counting-houſe, which the third partner admits to be partnerſhip property, but alleges that if an account were taken between him and his other two partners, it would be found that they were indebted to him. Though he would be ultimately bound to pay the whole bill himſelf upon an execution, yet he inſiſts that this property ought not to be taken to compel an appearance of the other two partners, and that the Plaintiffs are bound to proceed to outlawry. It is admitted that whatever may be taken in execution may be taken under a diſtreſs; and if the abſent Defendants had any intereſt in this property, it is liable both to execution and diſtreſs. If they had no intereſt, the ſheriff ought to have ſaid ſo by returning *nulla bona*. There is no ground in law, therefore, for objecting to this proceeding; and in point of diſcretion I ſee no reaſon why the Court ſhould interfere as a matter of favour in order to drive the Plaintiffs to an outlawry.

ROOKE (*a*) J. I am of the ſame opinion. The Plaintiff has a claim againſt the partnerſhip, and *Hudſon* has a claim againſt the partnerſhip alſo; does the claim of the latter afford any ground for ſaying that the former ſhould not have the benefit of his claim againſt the partnerſhip aſſets?

CHAMBRE J. No queſtion is made with reſpect to the ſtrict point of law. Admitting that the Court may interfere more in the caſe of a diſtreſs than an execution, yet their interference muſt

(*a*) Mr. Juſtice *Heath* was abſent.

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be regulated by a due regard to the equity and policy of the case. What may be taken under an execution may be taken under a diſtreſs. Why ſhould we interfere in the latter caſe to prevent the Plaintiffs from recovering a juſt debt? This Defendant is at any rate liable to anſwer the full extent of the Plaintiffs' demand; and after all the delay of an outlawry, execution may be ſued out againſt him to that amount. The law is with the Plaintiffs, and no reaſon appears for the exerciſe of our diſcretionary power in favour of the Defendant.

Rule diſcharged with Coſts.

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If an Admiral, commander in chief upon a ſtation, come home by leave of the Admiralty for the re-eſtabliſhment of his health, leaving the ſquadron under the command of the flag-officer next in ſeniority, but retain his commiſſion as commander in chief, *Quære* whether he be entitled to ſhare in prizes taken by the cruiſers of the ſquadron during his abſence?

THE queſtion in this caſe aroſe upon a ſpecial verdict found at the *Guildhall* Seſſions before Lord *Alvanley* Ch. J., and was twice argued in this court; 1*ſt*, by *Bayley* Serjt. for the Plaintiff, and *Beſt* Serjt. for the Defendant; and 2*dly*, by *Lens* Serjt. for the Plaintiff, and *Vaughan* Serjt. for the Defendant. The ſubſtance of the ſpecial verdict is ſo fully ſtated by Mr. Juſtice *Chambre*, in his judgment, that it has been thought unneceſſary to introduce it at length, and the arguments are omitted becauſe the caſe was ſo fully ſpoken to by the learned Judges.

After the ſecond argument in *Trinity* term laſt, the caſe ſtood over for the opinion of the Court, and on this day the learned Judges delivered their opinions *ſeriatim*, there being a difference among them.

CHAMBRE J. This caſe comes before the Court upon a ſpecial verdict in an action for money had and received, money paid and expended, and on an account ſtated; to which the Defendant pleaded the general iſſue.

The ſubſtance of the ſpecial verdict is, that, on the 2d of *October* 1795, the Lords of the Admiralty appointed Earl *St. Vincent* (then Sir *John Jervis*, admiral of the blue,) commander in chief of his Majeſty's ſhips and veſſels employed, and to be employed in the *Mediterranean*; requiring him forthwith to take upon himſelf the charge and command of the ſaid ſhips and veſſels as commander in chief; and charged the captains, officers, and companies belonging to the ſhips, to obey him as ſuch; and that Lord *St. Vincent* ſhould follow the orders and directions he ſhould from time to time receive

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from the Lords of the Admiralty, or any other his ſuperior officers. The verdict then ſtates Lord *St. Vincent*'s arrival at the ſtation, and taking upon him the command; the limits of which did not at firſt extend beyond the ſtraits of *Gibraltar*, but under an order of the Admiralty, dated the 7th of *November* 1796, they were extended along the coaſt of *Spain* and *Portugal*, as far to the northward as *Cape Finiſterre*; and continued ſo extended till after the time when the capture, which forms the ſubject of the preſent queſtion, was made. In conſequence of an application from Lord *St. Vincent*, the Lords of the Admiralty, by letter dated the 2d of *November* 1798, gave him permiſſion to return to *England* for the re-eſtabliſhment of his health, on his leaving the command of the fleet in the charge of the officer next to him in ſeniority, with ſuch inſtructions for ſuch officer's guidance as he might judge neceſſary, if he ſhould find, on the receipt of that letter, that the ſtate of his health ſhould abſolutely require it. Lord *St. Vincent*, after he had received that letter, wrote to decline availing himſelf of the indulgence till he ſhould be compelled to relinquiſh the command by a return of his complaint; and on the 11th of *March* 1799, he gave a written order to Captain *Digby*, of the *Alcmene*, being under his command as ſuch commander in chief, to cruize off the north-weſt coaſt of *Spain*, ſo long as his water and proviſions ſhould laſt, for the protection of the trade of his Majeſty's ſubjects and his allies; and when he found it neceſſary to go into port to re-victual, to repair to *Liſbon*, and return with the utmoſt diſpatch to the ſtation, and act as before directed till he had further orders. The ſtation thus appointed for Captain *Digby*'s cruize is found to be within the limits of Lord *St. Vincent*'s command. On the 16th of *June* 1799, Lord *St. Vincent* gave an order to Vice-Admiral Lord *Keith*, the officer next to him in ſeniority, in which, after ſtating the permiſſion obtained for his own return, he directs Lord *Keith* to take the command as follows: "Deſirous as I am of giving all poſſible effect and energy to his Majeſty's ſervice at a criſis which admits of no impediment, but, on the contrary, demands the fulleſt exerciſe of an efficient and uncontrolled authority, I have reſolved, on maturely conſidering theſe important objects, and on contemplating your Lordſhip's zeal and perſevering efforts in the attainment of them, to avail myſelf of the permiſſion thus proviſionally granted, and to leave his Majeſty's fleet ſerving upon this ſtation under your command. Your Lordſhip is therefore hereby required

and directed to take the ſeveral flag-officers and captains of the ſaid fleet under your command accordingly." Notwithſtanding the laſt order, Lord *St. Vincent* remained on the ſtation in the full and actual exerciſe of all the powers and authorities of commander in chief till the 31ſt day of *July* 1799; when under the permiſſion he had ſo obtained, he ſailed from *Gibraltar* in the *Argo*, for *England*; and on the 16th of *Auguſt*, before the taking of the prize hereafter mentioned, he arrived at *Spithead*. By permiſſion of the Admiralty, he went to *Bath*, for the benefit of his health; and continued in *England* till the 26th of *November* 1799, without having reſigned or being ſuperſeded or removed from his office of commander in chief; and during all that time, as ſuch commander in chief, he was continued and borne upon the *Argo*'s books. On the 29th of *July* 1799, Lord *Keith*, under the orders of Lord *St. Vincent*, who was then remaining at *Gibraltar*, paſſed the ſtraits with Admiral Sir *William Parker*, the officer next to him in ſeniority, and a detachment of the *Mediterranean* fleet, in purſuit of the combined fleets of the enemy; and on or about the 10th of *Auguſt* 1799, paſſed *Cape Finiſterre*, the northernmoſt limit of the ſtation. Having chaſed the enemy into *Breſt*, Lord *Keith*, with his ſquadron, in purſuance of an order from the Lords of the Admiralty, dated the 16th of *Auguſt*, proceeded to *Torbay*; and on the 19th of *Auguſt*, put himſelf under the command of Lord *Bridport*, the commander in chief of the *Channel* fleet. After Lord *St. Vincent*, Lord *Keith*, and Sir *William Parker*, had thus quitted the *Mediterranean* ſtation, Lord *Nelſon* became, and till after the capture of the prizes, continued the ſenior admiral perſonally ſerving within the limits of the *Mediterranean* ſtation. By a letter dated the 20th of *Auguſt* 1799, the admiralty ſent orders to Lord *Nelſon*, informing him, that, from the circumſtance of Lord *St. Vincent*'s return to *England*, and Lord *Keith*, with other flag officers, having quitted the *Mediterranean* in purſuit of the enemy, he was become the ſenior officer of his majeſty's ſhips in the *Mediterranean*; and that till the return of Lord *Keith*, or ſome other ſuperior officer, he would have all the important duties of that ſtation to attend to; and after obſerving that it was probable that Lord *Keith* would have left for his lordſhip's information and guidance, ſuch orders and inſtructions as he might have received either from the Admiralty or Lord *St. Vincent*, they proceed to point out the objects which require his particular attention, and give him directions reſpecting

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ſpecting his ſervices and the manner in which he is to employ the fleet. Lord *Nelſon* having become ſuch commander in chief, iſſued various orders to ſuch officers, commanders of ſquadrons and veſſels ſerving in the ſtation, as he fell in with. But he iſſued none to Captain *Digby*, whom he did not fall in with. The ſpecial verdict ſtates, *verbatim*, a great number of meſſages and orders, which, if they have any concern in the buſineſs, ought to have occupied a very few lines. Five of theſe documents are introduced on the part of the Defendant, eleven on the part of the Plaintiff. The whole of them ſeems to be the introduction of evidence of what there can be no doubt about, that Lord *St. Vincent* was conſidered by the Admiralty as retaining the office of commander in chief till his reſignation; and that after theſe junior admirals had left the ſtation, Lord *Nelſon* was conſidered as having the actual command of the ſtation, that all the orders and directions from the Admiralty were directed to him and not circuitouſly through the admiral in *England*. I will juſt mention the ſubſtance of each. The firſt is an order from the Admiralty, directed to Lord *St. Vincent*, dated the 15th of *October* 1799, deſiring him to order the captains and commanders under his command to alter the ſignal for the poſt-office packets. Againſt this there is an order of the ſame date and exactly of the ſame tenor, ſent to Lord *Nelſon*. The ſecond of theſe documents produced on the part of the Defendant is an appointment by Lord *St. Vincent*, dated the 16th of *October* 1799, of a flag lieutenant to his own ſhip the *Argo*, which had come home with him, and in which appointment he ſtiles himſelf commander in chief of the ſhips and veſſels on the *Mediterranean* ſtation. The third is dated the 20th of *Auguſt* 1799, and contains the Admiralty's approbation of his having granted leave of abſence to Mr. *Tucker*. The fourth is dated the 26th of *September* 1799, and acknowledges the receipt of Lord *St. Vincent*'s letter incloſing Captain *Digby*'s account of his capture of the *Courageux* privateer and two *Spaniſh* veſſels, and approves the captain's conduct; and the laſt, which is dated the 4th of *November* 1799, merely acknowledges the receipt of a letter with an incloſure, without ſaying of what nature. The documents on the part of the Plaintiff are, a direction to Lord *Nelſon* of the 1ſt of *September* 1799, for making a diſtribution of 4000*l.* among the crew of the *Ruſſian* ſhip which was to deliver up his Majeſty's ſhip the *Leander*; a direction of the 4th of *September* 1799,

1799, ſignifying the promotion of a lieutenant to the command of the *Perſeus* bomb; a direction of the 30th of *September* 1799, to ratify a miſtake which had been made as to the daily ſignals; a direction of the 15th of *October*, reſpecting the private ſignals of the poſt-office packets, the ſame as had been ſent to Lord *St. Vincent*; another direction of the 16th of *October*, to ſuffer the *Portugueze* ſquadron ſerving under his orders to return to *Liſbon* for repairs; an acknowledgment of the 22d of *October*, of a letter from Lord *Nelſon*, incloſing various accounts of proceedings, containing a ſtrong approbation of Sir *Sidney Smith*'s conduct, and an anſwer to Lord *Nelſon*'s letter as to a captain being advanced; another letter of the 23d of *October*, which contains a direction to permit the chaplain of the *Minotaur* to reſign his appointment in order to come home to ſucceed to a living; another of the 13th of *December*, taking notice of a letter from Lord *Nelſon*, ſtating that for certain reaſons, he had given Captain *Trowbridge* an order to wear a broad pendant, under particular circumſtances, and approving the ſame; another of the 14th of *December*, acknowledging the receipt of a letter of the 15th of *October*, with reſpect to the reduction of the iſland of *Malta*; another of the ſame date, ſaying that the Admiralty ſee no objection to the appointment of a commiſſary made by Lord *Nelſon*; and, laſtly, a letter from the Lords of the Admiralty, of the 22d of *February* 1800, to Lord *Nelſon*, informing him that they had granted commiſſions to two perſons recommended by him, but that they could not yet confirm the appointment of a third. This is the whole ſubſtance of this very long correſpondence, ſtated in this ſpecial verdict. Then, theſe facts are ſtated. That on the 17th of *October* 1799, after Lord *St. Vincent*'s return to *England*, and while the Plaintiff was ſenior admiral perſonally ſerving on the ſtation, Captain *Digby*, who had received no orders from the Plaintiff ſubſequent to thoſe he had received from Lord *St. Vincent*, with his own ſhip, detached from Lord *Nelſon*'s ſquadron, in company with ſome other *Engliſh* ſhips, captured two *Spaniſh* ſhips of war, which have been ſince condemned as prize to the *Alcmene* and other ſhips. Lord *Nelſon* was not on board the *Alcmene* at the time of the capture. The Defendant, againſt whom the action is brought, is the principal prize agent for the flag officers, and the verdict ſtates the ſum he has in hand on account of the Plaintiff, or Lord *St. Vincent* as rightly may appear, to be 13,015 *l.* 4 *s.* The proclamation of the 25th of *January* 1797 is then ſet forth. But, as that is the inſtrument

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inſtrument which we are called upon to expound and to apply the other facts to, I will firſt mention the few remaining facts ſtated in the ſpecial verdict; which are, That Lord *St. Vincent* reſigned his commiſſion as commander in chief in the *Mediterranean* long after theſe prizes were taken, on the 26th of *Nov.* 1799, up to which time he received pay and table money as ſuch commander in chief. That Lord *Nelſon*, after he had left the ſtation, received the ſame pay as he had done before, but not the pay of a commander in chief. But that from the 12th of *Auguſt* he received the ſame table money as was allowed to Lord *St. Vincent*. Theſe are the circumſtances under which each of the real parties to the ſuit (for the Defendant is but a nominal one) claims to be entitled, by the proclamation of the 25th of *Jan.* 1797 and the prize act, to the ſhare of Captain *Digby*'s prize, which belongs to the chief or ſenior flag officer under whoſe command Captain *Digby* was at the time of the capture. The form of this proclamation we are told has been uſed ever ſince the year 1756; when ſome alterations were made, though not very material ones, in the form that had been introduced in the year 1744. The material clauſes in this proclamation of 1797, upon which the queſtion depends, are theſe: The proclamation in the firſt place directs the net produce of all *Spaniſh* prizes to be divided into eight equal parts, of which the captain or captains of the ſhips actually on board at the time of taking of any prize are to have three-eighths. But this is qualified by a proviſion which is made for flag officers, if there ſhall happen to be any; and it is qualified in this way: "But in caſe any ſuch prize ſhall be taken by any of his Majeſty's ſhips of war under the command of a flag or flags, the flag officer or officers being actually on board or directing and aſſiſting in the capture ſhall have one of the three-eighths, the ſaid eighth part to be paid to ſuch flag officer or officers in ſuch proportion and ſubject to ſuch regulations as are thereinafter mentioned." And then, it directs that the following regulations ſhall be obſerved concerning the one-eighth granted to the flag officer or officers: ſo that thoſe regulations that follow relate to flag officers, and to flag officers only. The firſt of theſe is, "That a flag officer commander in chief, when there is but one flag officer upon ſervice, ſhall have to his own uſe the ſaid one-eighth part of the prizes taken by ſhips and veſſels under his command." The ſecond, "That a flag officer ſent to command at *Jamaica* or elſewhere ſhall have no

right to any ſhare of prizes taken by ſhips or veſſels employed there before he arrives at the place to which he is ſent, and actually takes upon him the command." The third clauſe is, "That when an inferior flag officer is ſent out to reinforce a ſuperior, the ſuperior has no right to any ſhare of the prizes taken by the inferior before the inferior ſhall arrive within the limits of the command of the ſuperior, and actually receive ſome order from him." Then comes the fourth article, upon which the queſtion principally, and almoſt entirely depends, which is this; "A chief flag officer returning home from *Jamaica* or elſewhere ſhall have no ſhare of the prizes taken by the ſhips or veſſels left behind to act under another command." Then there are three other articles which relate merely to the proportions in which the one-eighth is to be divided when there are more flag officers than one, which are not material to the preſent queſtion. The queſtion therefore ſeems to turn, almoſt entirely, upon the conſtruction of the fourth article; though, if there were any ambiguity in it, reſort might be had to the preceding articles, as more fully ſhewing the general view and intention of the proclamation. But where is the doubt or ambiguity in the language of this fourth article? Was not Lord *St. Vincent* "a chief flag officer returning home?" Of that there can be no doubt. And were not prizes taken "by veſſels left behind to act under another command?" And was not that command the command of Lord *Nelſon?* I really do not ſee how any caſe can more diſtinctly come within the letter of and plain intention of a regulation. It ſeems to me to be impoſſible to ſtate one. And thinking ſo, it ſtrikes my mind to be impoſſible to ſtate a caſe that is more plain, unleſs, like the brothers in *Swift*, in conſtruing their father's will, when we find it will not anſwer our purpoſe, we pin a codicil to it. Although I conſider the language of this proclamation as ſo exceedingly plain, ſtill I muſt admit, that it has been the ſubject of very copious and very elaborate arguments in the courts of juſtice, and eſpecially in the caſe of *Johnſtone* v. *Margetſon*, reported 1 *H. Bl.* 262. It has alſo been diſcuſſed in a more recent caſe, the caſe of the *St. Anne* in the Court of Admiralty, which is reported in Dr. *Robinſon's Reports*, 3 vol. fol. 60. This laſt caſe is preſſed upon us as a caſe in point for the Defendant. And, if it were ſo, a deciſion of higher authority cannot be ſtated. But that deciſion appears to me to have no application to

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the preſent queſtion, and to turn upon a point that cannot ariſe here; for I think that it has been truly obſerved in the courſe of the argument, that the whole of the part of the proclamation now in queſtion relates to flag officers only, and the apportioning their ſhares among themſelves. But in the caſe of the *St. Anne* there was no flag officer left in command. The King's Advocate was ſtopped by the Court as ſoon as he noticed that deciſion. And Sir *William Scott* decided the caſe upon the ſingle point, that the Admiral had not abdicated his command under the circumſtances there ſtated, conſidering the queſtion to turn ſolely upon the right of the admiral, there being no other flag officer that had any claim or any right to ſhare in that one-eighth with the admiral. He therefore conſidered the admiral, under the circumſtances of that caſe, not having abdicated the command, to be entitled under the general clauſe; and, under the circumſtances of that caſe, not to be effected by the reſtraining proviſo. In the former caſe, which is reported in *H. Bl.*, there is no deciſion at all upon the point now before the Court; nor is any opinion hinted by the Court upon it. The determination againſt the Plaintiffs proceeded there upon the ground of Commodore *Johnſtone*, to whom they were executors, having no command at all at the time of the capture, becauſe the Court conſidered his acceptance of an appointment to the command upon another ſtation to be a virtual reſignation of his former command. And, having no command at all, his repreſentative could not be entitled to any ſhare of the prize. The preſent queſtion, therefore, ſtands perfectly clear of authority. Some arguments have been uſed ariſing from collateral circumſtances in the caſe; and theſe are, That Captain *Digby* was acting under orders received from Lord *St. Vincent*; that he had received no particular order from Lord *Nelſon* after Lord *St. Vincent* had quitted the ſtation; and that as Lord *St. Vincent* was reſponſible for the orders he had given, he ought alſo to ſhare in the emoluments. The laſt argument would go a great way indeed, as a military officer, I preſume, continues reſponſible for his conduct at leaſt as long as he continues a military officer in any capacity whatever. But the caſe of *Pigot* v. *White*, which has been referred to in the argument, and is reported in a note to the caſe of *Johnſtone* v. *Margetſon*, is a complete anſwer to theſe objections. I ſhall therefore return to the examination of the proclamation itſelf. For what purpoſe

were theſe different reſtrictions introduced? Manifeſtly with this view; that a bare authority under a commiſſion ſhould not entitle a flag officer to ſhare unleſs he was upon the ſtation at the time, and a partaker then in the actual labour and danger of the ſervice. With this view the commander in chief, when going out, is alſo reſtrained from ſharing in prize till he arrives upon the ſtation, and actually takes upon him the command. The laſt part of this reſtriction explains what is meant by having or taking the command. In one ſenſe, he takes the command when he accepts the commiſſion. And before the iſſuing of this proclamation he would have been entitled to a ſhare. In the ſame ſenſe only, I conceive, has he the command when he is returning from the ſtation without being actually ſuperſeded. But that is not what the proclamation means. It means actual ſervice and exerciſe of the command at the ſtation, in contradiſtinction to the authority ariſing merely from his commiſſion. And, to be conſiſtent, the fourth article, when it ſpeaks of leaving the ſhips behind to act under another command, muſt, as I conceive, be underſtood in the ſame ſenſe. How has the Admiralty, and how have the parties themſelves underſtood what was meant by having the command? Lord *St. Vincent*, when he applies to the Admiralty, receives permiſſion to come home, leaving the command of the fleet in the charge of the officer next to him. So ſay the Admiralty. Lord *St. Vincent*, in his anſwer, ſays, he would not avail himſelf of the indulgence, till he ſhould be compelled to relinquiſh the Command. When Lord *St. Vincent* gives his orders to Lord *Keith*, it is to take the command. He ſays, that the ſituation in which he ſhall leave him demands the fulleſt exerciſe of an efficient and uncontroled authority. He ſays, that he is determined to leave his Majeſty's fleet ſerving upon this ſtation under Lord *Keith*'s command. "Your lordſhip is, therefore, hereby required and directed to take the ſeveral flag officers and captains of the fleet under your command accordingly." Again, when the Admiralty write to Lord *Nelſon*, they tell him he was become the ſenior flag officer, and that he would have all the important duties of that ſtation to attend to. It is ſaid the fourth article, when it makes uſe of the expreſſion "another command," means another ſeparate, independent command under a particular commiſſion. Now, if that be the meaning of the fourth article, I ſhall be very glad to know for what

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purpoſe that article was introduced at all. It is an obſervation which ariſes in favour of the Plaintiff. And it ſeems to me to be an argument of very conſiderable weight. If another commiſſion had iſſued appointing another perſon to the chief command, what pretence would the admiral, ſo ſuperſeded, have to any ſhare in prizes upon his return home? It is impoſſible that he could when he had quitted the ſtation and was upon his return home. This clauſe would be entirely nugatory: and, certainly, we ought ſo to conſider this proclamation as to give effect to every thing that we find in it, and not ſo to conſtrue it as to determine that any particular clauſe, much leſs ſo material a one as this, is totally unneceſſary. But this Clauſe in the proclamation is no haſty compoſition. There was a ſimilar one in the proclamation in the year 1744; and that, too, was introduced as an amendment of the former proclamation, which had iſſued in 1740. It was a ſtudied amendment of that former proclamation. That new form of proclamation, which was introduced in 1744, was continued in the proclamation of 1756. It was again conſidered; and after that conſideration it was again expreſſed in the terms in which we now find it. Now, let us ſee what are the amendments that are made by this proclamation in 1797, and how the article ſtood in the former proclamation of 1744. Thus far the article is the ſame, "That a chief flag officer returning home from *Jamaica* or elſewhere ſhall have no ſhare of the prizes taken by the ſhips or veſſels." In the former proclamation, inſtead of the words "left behind to act under another command," it ſtood ſimply thus: "taken by the ſhips or veſſels after he has got out of the limits of his command." No queſtion then could ariſe upon the nature of the commiſſion which any flag officer whom he might leave behind with the ſhips had. Whether he had the command in chief, or whether he had not a commiſſion as commander in chief, could make no difference at all; becauſe, in that caſe the chief flag officer ſo returning home would be ouſted of any ſhare in the prize-money, whatever was the commiſſion held by the next flag officer in ſeniority. The words now introduced are, "left behind to act under another command." There is not a word in this clauſe of any other commiſſion being granted to any other perſon. And it ſeems to me, the words "under another command" muſt, from the ſubject-matter both of this and the preceding clauſes, be conſidered,

as a regulation between flag officers, and be underſtood to mean another command of a flag officer. But, perhaps, when the Council had it in contemplation to amend the proclamation, they might think they had expreſſed themſelves more explicitly by introducing theſe words, than ſaying generally, "after he has got out of the limits of his command he ſhall have no ſhare of the prizes taken by the ſhips or veſſels left behind to act under another command," referring merely to the actual ſervice of the fleet, and to the perſon who had the actual command and gave the orders upon the ſtation. The proclamation ought, as I conceive, if it is expreſſed in plain and intelligible language, to be conſtrued according to its plain and common ſenſe. And we ought not to have recourſe to wild conjecture or to extrinſic inquiries in order to put a different conſtruction upon it than that which the words of the proclamation itſelf fairly import. I think, too, that the conſtruction which I am inclined to put upon this proclamation is that which beſt anſwers the manifeſt purpoſes of the proclamation itſelf, and of the public ſervice: for the object was to give encouragement to thoſe who were actually engaged in the ſervice, and not to thoſe who were merely at the time of taking the prize nominal ſervants of the public in virtue of a commiſſion. Between the two noble admirals, who are contending for this prize, it would be very invidious to draw any ſort of compariſon. The merits of each of them are with the public ineſtimable. And it is with ſome reluctance that we muſt feel ourſelves under the neceſſity of deciding this caſe in ſuch a way that in giving to one of theſe noble admirals what he ſo richly deſerves, we are obliged to take it from the other: but we muſt act according to the neceſſity; we muſt give our judgment according to the opinion we really form upon the meaning and intention of this proclamation. The proclamation is not incumbered by technical terms. It has no reference to any ancient courſe of the ſervice. But the proviſions of it ariſe ſolely from the act, and from the proclamation itſelf. I need not therefore go more at large into the arguments which have been ſo fully diſcuſſed, both upon the preſent and upon the former occaſion, and in ſome degree touched upon likewiſe in the caſe in the Admiralty, though not ſo fully as in the argument of the preſent caſe and the preceding caſe of *Johnſtone* v. *Margetſon*, becauſe, in conſequence of the interruption of the King's Advocate, who was counſel for the then repreſentative of Admiral *Murray*, he did not go on with

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that part of his argument, which might have been applied to this caſe. Upon the whole, however, this matter has been ſo very fully and ſo very ably diſcuſſed on each of theſe occaſions, that, without ſaying any thing further upon it, I content myſelf with declaring, that I think it plain that Lord *St. Vincent* was "a chief flag officer returning home;" that "he left the fleet to act under another commander;" and that "commander" was Lord *Nelſon*. Under theſe circumſtances my opinion is that the Plaintiff upon this ſpecial verdict is entitled to recover.

ROOKE J. This is a queſtion on the conſtruction of a royal proclamation, iſſued by virtue of a diſcretionary authority veſted in the Crown under the prize acts. By 33 *G.* 3. *c.* 66. the intereſt in captures is veſted in the officers and ſeamen, to be divided in ſuch proportions and after ſuch manner as his Majeſty hath, by his proclamation of the 17th *April* 1793, already ordered and directed, or ſhall think fit to order and direct by proclamation iſſued for thoſe purpoſes. The 35 *G.* 3. *c.* 121. extends theſe proviſions to captures from the *Dutch* and *Spaniards*. As this proclamation is matter of abſolute diſcretion in the Crown, as it may be varied whenever his Majeſty may think proper, and as the war which gave riſe to it is now at an end, I conſider this as a queſtion not of any great importance to the naval ſervice at large, but as a queſtion which ſolely affects the private claims of the two noble perſons who are the real parties to this cauſe. To veſt the ſole intereſt of naval prizes in the captors has been the wiſe policy of the legiſlature of this country for a long time paſt, and it has been intended as a gratuity and reward to thoſe whoſe ſervices occaſion the capture, and to thoſe who by a ſort of political preſumption may be conſidered as contributing to it. The proclamation on which this queſtion ariſes is in the ſame form as all thoſe which have been iſſued ſince the year 1756. I preſume it is in ſome degree founded on rules of naval policy, and has a reference to the terms and courſe of the naval ſervice, therefore I hold myſelf bound to conſtrue it, not by the dry rules which prevail in the conſtruction of legal pleadings, but according to that policy and the courſe of that ſervice which thoſe who adviſed his Majeſty ſeem to have had in view when the proclamation iſſued, and which the Lords of the Admiralty ſeem to have adopted ſince, as far as this can be collected from the ſpecial verdict. The proclamation orders that in caſe any prize be taken by any of his Majeſty's ſhips under the

command of a flag or flags, the flag officer or officers, being on board and directing and aſſiſting in the capture, ſhall have one-eighth of the three-eighths given before to the captains, and the ſaid one-eighth to be paid to ſuch flag officers in ſuch proportions, and ſubject to ſuch regulations, as are thereinafter mentioned. 1. A flag officer commander in chief, when but one flag officer, ſhall have the one-eighth to his own uſe. 2. When ſent to command at *Jamaica*, &c. a flag officer ſhall have no ſhare of prizes taken by ſhips employed there, before he arrives at the place to which he is ſent and actually takes upon him the command. 3. If an inferior flag officer be ſent out to reinforce a ſuperior, the ſuperior ſhall have no ſhare of prizes taken by the inferior before he ſhall arrive within the limits of the command of the ſuperior, and ſhall actually receive ſome orders from him. 4. A chief flag officer returning home from *Jamaica*, &c. ſhall have no ſhare of the prizes taken by the ſhips left behind to act under another command. 5. The 5th article is immaterial to this queſtion. 6. When more flag officers than one ſerve together, the one-eighth of the prizes taken by any ſhips or veſſels of the ſquadron ſhall be divided in the following proportions: If only two, the chief ſhall have two thirds; if more than two, the chief ſhall have only one half. This proclamation is not penned ſo clearly as it might have been. The fourth regulation, as to the flag officers returning home, is equivocal; it may reſpect all chief flag officers returning home under all circumſtances; it may reſpect only ſuch chief officers as return home and are relieved by others. The leaving ſhips behind to act under another command may mean to act under the abſolute command of another, who is appointed to relieve or ſucceed the chief who returns home; or it may mean leaving ſhips to act under the command of the next ſenior flag officer who remains on the ſtation, and who is to act temporarily and proviſionally till the chief returns, or till a new commander in chief is appointed. To ſolve this doubt, and to enable me to decide which conſtruction ſhould prevail, I think it neceſſary to look through the whole proclamation, and alſo to ſee what caſes have already been decided upon it, and what appears from the ſpecial verdict to be the courſe of the ſervice. As to the proclamation, the captain who takes a prize, if he is under the command of a flag, is to let the flag officer have one eighth. Theſe words "under the command of a flag" in this clauſe, and the words "under another command" in the fourth clauſe,

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clauſe, may, I think, reaſonably be conſtrued to have a ſimilar meaning: they are both in the ſame proclamation, and both *in pari materiâ*. What is meant by being under command in the one clauſe, ſhould alſo be conſidered as meant by being under command in the other. Now it has been decided, in the caſe of the *St. Anne*, (and very rightly, as I think, according to the courſe of the ſervice,) that when a flag officer leaves his ſtation on account of health, and does not abdicate the command, the captain to whom he has at any time given orders is ſtill under his command: for the ſame reaſon it appears to me that when a flag officer leaves his ſtation on account of health, and leaves a junior flag officer to act in his abſence, that junior is ſtill under his command; and if he is, then the whole fleet is ſo; and if the whole fleet is ſtill under his command, within the ſenſe of the firſt clauſe, I think it is to be conſidered as under his command, and not under another command, within the ſenſe of the fourth clauſe. It is probable, for I do not aſſert it as a known fact, that before the proclamation of 1744, flag officers returning home claimed a right to ſhare in the prizes taken by the cruiſers who had received orders from them, and had received none from the officer who relieved them. The proclamation of 1744 ordered that they ſhould not ſhare in the prizes taken after they got out of the limits of their command. But this being always diſputable and uncertain, the proclamation of 1756 made the preſent regulation that they ſhould ſhare in no prizes taken after they had left the ſquadron to act under another command. This form has continued ever ſince, and I think it was intended to prevent diſputes between flag officers, where one is going out to relieve, and the other is returning on being relieved, and was not intended to deprive of prize-money all flag officers who are returning home under all circumſtances whatever. It is well known in point of fact that officers have been ſent for home that Government might conſult or adviſe with them—they may render the public as eſſential ſervice by their return on ſuch an account as if they had remained on their ſtation. It would be hard that in ſuch caſe they ſhould loſe the emolument of prize-money, which is a mere gratuity from the country, and diſpoſeable at the diſcretion of the Crown. Unleſs the words of the proclamation make ſuch a conſtruction abſolutely neceſſary, I cannot aſſent to it. And as to the danger of abuſe, I will not preſume that the Board of Admiralty will abuſe their truſt: but if they are diſpoſed to do ſo, they

(who probably have great influence in ſettling the forms of theſe proclamations), may, by changing the terms of them in future, be either enabled or reſtrained, as his Majeſty may be adviſed to order. So, with reſpect to the objection of an officer's returning home on account of health, when the Admiralty give him leave, they may qualify their leave as they think proper. They may order that he ſhall reſign his command, they may appoint another officer to ſucceed or relieve him; and if they do, when he leaves the fleet he may leave it under another command. But when the Board of Admiralty indulge a flag officer with a temporary leave of abſence on account of his health (injured probably by his exertions in the public ſervice) and ſuffer him ſtill to retain his character of commander in chief, and correſpond with him in that character, and do not appoint a new commander in chief till the officer who has returned home relinquiſhes the command, I think the Admiralty by this practice draw the line as to their idea of who has the command of the fleet, and who has not, within the terms of the proclamation, and declare that the fleet is not under another, but under the ſame command, till a new commander in chief is appointed. Another obſervation occurs to me: flag officers may be preſumed, from their rank and experience, to be better qualified to command fleets than captains are. Now according to the conſtruction contended for by the Plaintiff, the caſe of a flag officer leaving his ſtation and returning home, would ſtand thus: if he left his fleet under one leſs qualified to command, he would ſhare prize money with him; if he left it under the command of one who by his rank was to be preſumed to be qualified to command, he would loſe all the emolument of prize money. This ſurely would not promote the public ſervice. If we could ſuppoſe ſordidneſs to attach on the naval character, it might rather tempt a chief flag officer to ſend his inferior home on ſome pretence or other, that by leaving a captain only behind, he might retain his chance of prize money. A caſe was put in the courſe of the argument, to which no anſwer was given which was ſatisfactory to my mind. Suppoſe the ſecond in command to die, and a captain to take the command as ſenior officer, are the captains then under no flag, or does the right of the chief revive? What ſhall we ſay as to theſe difficulties? Are they owing to omiſſions in the proclamation, or do they flow only from a miſtaken conſtruction of it? By the 6th clauſe of the proclamation, when more flag officers than one ſerve together,

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together, the eighth of the prizes taken by any ships or veſſels of the ſquadron ſhall be divided in the following proportions; if only two, the chief ſhall have two thirds, if more than two, the chief only one-half, and the other one-half to the reſt. Here the flag officers are conſidered as ſerving together, though they ſerve at great diſtances from each other, if they are under the ſame commander in chief. Lord *Nelſon* at the *Nile*, and Lord *Keith* off *Cadiz*, were each entitled as flag officers to a ſhare of the prizes taken by the cruizing frigates, though the captains of the frigates received their orders from Lord *St. Vincent* as the commander in chief, and though theſe inferior flag officers had no concern whatever in the capture. It is not therefore the real merit of the flag officer in reſpect to the particular ſervice that intitles him to his ſhare of prize money, but it is rank and ſtation and the general ſervice which he renders or is preſumed to render to the ſtate by acting in his particular department in the ſquadron. In the preſent caſe it would be difficult to aſſign any real moral merit which ſhould intitle either of theſe contending parties to ſhare in this capture rather than the other. The Plaintiff gave no orders to the captain of the *Alcmene*, the commander in chief did. Neither were preſent at the capture. The commander in chief was abſent from his ſtation on account of health; the Plaintiff had the actual but ſtill only the occaſional command of the fleet in his abſence. The right therefore is a technical or artificial right, and muſt be decided ſolely by the terms of the proclamation and the courſe of the ſervice. The chief flag officer came home with leave, was addreſſed by the Admiralty Board as commander in chief, and received pay and table-money as commander in chief. The flag officer who was left on the ſtation received table-money (very rightly becauſe his expences were neceſſarily increaſed), but had no appointment as commander in chief till ſome time after this capture. Hence it appears the Admiralty Board recognize the diſtinction between an occaſional and a permanent commander, and allow under circumſtances the permanent commander in chief to be abſent, and the next in ſeniority to command proviſionally during his abſence; that during ſuch time they ſtill conſider the abſentee as the real chief flag officer, and the other as acting under his implied command. The admiralty-letter to Lord *Nelſon* of the 20th *Auguſt* 1799, has the following paſſage: "You are now become the ſenior flag officer, and you will have all the important duties of that

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ſtation to attend to. It is probable Lord *Keith* will have left for your lordſhip's information and guidance ſuch orders and inſtructions as he may have received either from their lordſhips or from Lord *St. Vincent*." It does not addreſs Lord *Nelſon* as commander in chief; but it conſiders him as poſſibly ſtill acting under inſtructions from a ſuperior officer. While this is the avowed practice of the Admiralty Board, I conſider the proclamation as adapted to it, and muſt conſtrue it accordingly. Upon the whole I am of opinion that comparing the ſeveral parts of this proclamation together, and conſidering the courſe of the ſervice, and the proceedings of the Board of Admiralty in reſpect to theſe parties, the true meaning of this proclamation (which however I admit to be equivocal), is, that a chief flag officer returning home and retaining his character of commander in chief does not, by leaving an inferior flag officer to command in his abſence, leave the ſhips to act under another command. I ſee no greater danger in this than in the contrary conſtruction, and I am the more eaſy under the opinion I have formed, becauſe it is a queſtion which concerns two individuals only, and will not lead to any general conſequences: for I am fully perſuaded that before we ſhall have occaſion for the further ſervices of theſe or any other naval officers, his Majeſty will be adviſed to iſſue ſuch a proclamation for the diſtribution of prize money as will effectually prevent any diſpute ſimilar to the preſent. I think judgment ſhould be given for the Defendant.

HEATH J. The claim of the Plaintiff is founded on the fourth clauſe of the King's proclamation for the diſtribution of prizes among the flag officers, which declares that the flag officers "returning home from *Jamaica* or elſewhere, ſhall have no ſhare of the prizes taken by the ſhips or veſſels left to act under another command." However clear the conſtruction of this clauſe may be in my apprehenſion, yet the difference of opinion which ſubſiſts between us, and the deference I owe to my brothers, who differ from me in opinion, induce me to think it looſely, inaccurately, and ambiguouſly worded. Two different interpretations have been given to it. And whether it is to be underſtood in the one or the other ſenſe muſt depend on the intention of the framer ſo far as it may be collected by comparing this with the other clauſes of the proclamation. If that be ſtill doubtful, recourſe muſt be had to grammatical conſtruction and verbal criticiſm. Conſiderable aſſiſtance may be derived from comparing the preſent proclamation

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with antecedent ones on the ſame ſubject. On the part of the Plaintiff it is contended that the words "the ſhips or veſſels left to act under another command," import the command of another admiral. On the behalf of Earl *St. Vincent* it is inſiſted, that the flag officer, though returned home and here in port, is entitled to his ſhare of prizes, inaſmuch as he retains the command until he be ſuperſeded. Firſt, To conſider the different parts of this inſtrument. The firſt clauſe being to veſt a certain ſhare of prizes in the commanding flag officer, the ſubſequent clauſes go, in certain caſes, to abridge that right. The object or policy of theſe limitations ſeems to be this, that flag officers ſhall be ſtimulated to an active diſcharge of their duty, and to be preſent with their ſquadrons after they have entered on their command, and that they may not be tempted to loiter in port by a full aſſurance of ſharing in the prizes that ſhall be taken without incurring the riſk of war or climate. The ſecond clauſe is *in pari materiâ* with the fourth. By the ſecond clauſe, the flag officer is not entitled to a ſhare of prizes "before he arrives at the place to which he is ſent, and actually takes upon him the command." Now it would be a ſtrange overſight, in drawing this proclamation, to enforce the preſence of the admiral until he has joined his ſquadron, and after he has joined it, not to enforce the continuance of his preſence with it. Excuſes that may be made for diſpenſing with abſence, as ill health, or the urgency of private affairs, can ſeldom be accurately aſcertained. It was a wiſe policy to hold out ſuch encouragement to flag officers, as ſhould make it their beſt intereſt, as well as their duty, not to abſent themſelves from their ſquadrons on ſlight and trivial occaſions. The proclamation of 1740 allots a ſhare of prizes to the flag officer being actually on board the ſhip, or directing and aſſiſting the capture. Probably in framing the proclamation it was intended to exclude the abſent flag officer who had never actually taken upon himſelf the command. If it were ſo, that intention was not ſufficiently expreſſed. The proclamation of 1744 aſcertains its intent and policy moſt indiſputably. And if it had not been altered the claim of Earl *St. Vincent* muſt have been barred. For, by the fourth clauſe, the flag officer was to receive no ſhare of prizes after he had got out of the limits of his command. The alteration in the ſubſiſting proclamation introduces all the difficulty in this caſe. Was the policy then changed, or was it intended to relax the diſcipline of the navy? That never can be imagined to be

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the caſe. The true reaſon of this alteration, as I conjecture (and I deſire it may be taken as only a conjecture on which I do not found my judgment), was accurately to fix the time when the flag officer returning home ſhould ceaſe to be entitled to his ſhare of prizes. Probably ſome diſpute or litigation had ariſen on that ſubject. The moment of the capture of a prize was always eaſily aſcertained by entries in the log-book of the capturing veſſel. But it was not ſo certain when the Admiral had paſſed the capes or headlands which formed the limits of his ſtation. They might have been paſſed in the night time, in hazy weather, or at ſo great a diſtance as to be out of ſight. This muſt have opened a great field of litigation. But the departure of a flag officer from his fleet on his return homeward can be aſcertained to a moment. So that, by comparing the ſeveral entries in the log-books belonging to the ſhip of the flag officer and of the capturing ſhip, it might eaſily be aſcertained whether or no the flag officer had a right to ſhare the prize. A conſequence indeed has followed from this alteration, namely, that as in the caſe of the *Saint Anne*, an admiral quitting his ſtation and leaving the command to a ſenior captain will be entitled to his ſhare of prizes until he ſhall be ſuperſeded. This is by neceſſary conſtruction. It is not ſo expreſſed. I muſt think it an overſight, for I never can preſume that ſuch a flag officer would be ſo much favoured as to have an alteration made and the diſcipline relaxed in his favour. No principle of public policy, no conſideration of naval diſcipline, could have authoriſed this alteration for the purpoſe of entitling ſuch a flag officer to ſhare. And taking it in another point of view, that the alteration was made for the reaſon that I have conjectured, or to avoid ſome other inconvenience which does not at preſent occur, there is nothing ſo common in the framing of inſtruments as that whilſt the framer of them is ſtudious to avoid one inconvenience, he incurs another which does not preſent itſelf to his view. This is often to be ſeen in acts of parliament. Much more is ſuch an inaccuracy to be expected in framing an inſtrument of this ſort. Some argument may be drawn from the phraſeology of this proclamation. The actual preſence of the admiral to entitle him to a ſhare of prizes is curſorily mentioned in the proclamation of 1740. It is more enforced in the proclamation of 1744, and moſt of all, in the ſubſiſting proclamation. In the ſecond article of the ſubſiſting proclamation, the flag officer is not entitled until he actually takes upon him the command. And ſo in the

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third clauſe, the flag officer there deſcribed ſhall not be entitled until he actually receives ſome order from his ſuperior flag officer. Now, the word "actually" in the correſponding clauſes of the antecedent proclamations is not to be found. It would be ſtrange to ſuppoſe that an actual arrival ſhould be neceſſary, and be anxiouſly required, to entitle the flag officer to his ſhare of prizes, and yet his actual continuance ſhould be diſpenſed with, even after it had been enforced by an antecedent proclamation. Next I ſhall conſider what is the grammatical conſtruction. "Another" is a relative pronoun. The rule of grammar, of logic, and of law, is the ſame. *Fiat relatio proximo antecedenti.* There is no other antecedent but "flag officer." There is no other ſubject of this part of the proclamation. That conſtruction of the clauſe in queſtion ſeems to be moſt probable in which the ſtrict grammatical conſtruction coincides with the profeſſed object and avowed policy of the inſtrument. The deciſion of the Court of Admiralty in the caſe of the *St. Anne* is founded on this conſtruction; for the flag officer was holden to be entitled to a ſhare of prizes, becauſe he had not left the command under another flag officer. The word "command" has two ſignifications. In a limited ſenſe it implies, either the immediate power and authority of a flag officer to direct the motions of a ſquadron, in which ſenſe it is uſed in the correſpondence between the Plaintiff and Earl *St. Vincent*; or in a more extenſive ſenſe, the paramount authority which the flag officer holds and retains whilſt he is continued in the ſame ſervice, whether abſent or preſent. The former meaning correſponds, in my judgment, with the true intent of the proclamation. It cannot be diſputed but that the Plaintiff had, in ſome ſort, the command; for he correſponded directly with the Admiralty, and had a table maintained for him. Having conſidered the claim of the Plaintiff, it remains to conſider the conſtruction put on this clauſe by Earl *St. Vincent*'s Counſel, *viz.* that he was entitled to retain the command till he was ſuperſeded. That muſt have been the caſe if the fourth clauſe had been omitted. This is the "*maledicta interpretatio quæ corrumpit textum.*" What greater corruption of the text can there be than to annihilate all its ſenſe and meaning? The proclamation ought to receive a liberal conſtruction, the more eſpecially as it is explanatory of a former proclamation. And, when a perſon undertakes to explain his own meaning, we are not to extend the ſame by conſtruction. It is ſo in ſtatutes. But there ſeems to be a

clear objection to it; which is, that it renders the clauſe nugatory and ſuperfluous. It is a ſtrange ſuppoſition that the correſponding clauſe in the antecedent proclamation, which has a clear determinate meaning, ſhould be altered to introduce another clauſe deſtitute of all effect whatever. If there be two interpretations of a clauſe, and the one of them gives a clear meaning, and the other affixes no ſenſe but what would otherwiſe be neceſſarily intended, it is eaſy to decide which of the two interpretations ought to have a preference. It ſhould be ſo conſtrued "*ut res magis valeat.*" A ſuppoſed caſe of hardſhip has been put at the bar; that a flag officer might be called home to conſult with the Lords of the Admiralty, and in ſuch event, it would be hard to deprive him of his ſhare of the prizes taken in his abſence. To that I anſwer, no ſuch caſe has ever occurred in the naval hiſtory of this country ſo far as I recollect. If it ſhould exiſt, it might be lamented. But proclamations, like laws, are adapted to caſes that uſually happen. It has been argued at the bar in the preſent, as it was by the Counſel in the caſe of the *St. Anne*, that the ſhare of the flag officer was given to him on account of his reſponſibility, and therefore, whilſt the reſponſibility laſts, his title to a ſhare muſt continue. I have not yet learned where that principle is to be found. It is not ſo expreſſed in the proclamation. The reſponſibility of the flag officer is not co-extenſive or co-exiſtent with his title to a ſhare of prizes. It commences before he arrives on his ſtation and actually takes the command of the ſquadron, and may well continue after he has left the command to another. Is not a ſhare of the prizes proportionably given according to rank and ſtation to every commiſſioned officer? and are they not all reſponſible in their ſeveral employs? If the flag officer in port, after leaving the command to another, be entitled, ſurely the flag officer before he has joined his ſquadron ought equally to be entitled, which is not the caſe. From hence I infer, that it was never intended that the title of the flag officer to a ſhare of prizes, according to the true intent and meaning, as well as to the ſpirit and the policy of the inſtrument, ſhould be co-exiſtent with the command. Suppoſe a flag officer, ordered to take the command of a diſtant ſquadron, loiters in port, and neglects to tranſmit the orders he receives from the Admiralty; ſurely he is reſponſible. And yet he is not entitled to a ſhare of prize-money by the proclamation. For theſe reaſons, I am of opinion, that judgment ought to be for the Plaintiff.

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Lord ALVANLEY Ch. J. I cannot ſufficiently lament that I ſhould be called upon to give my opinion upon the interpretation of a proclamation reſpecting a ſubject of this nature. But, as the law calls upon me to put a conſtruction upon it according to the beſt of my judgment, I have only to look at the proclamation with reference to the ſubject which it concerns. I agree with my Brother *Rooke* completely in thinking, that a proclamation of this nature ought not to be conſtrued according to the ſenſe which, at the firſt reading of it, a perſon may put upon the words that it contains: for it relates to a ſubject which embraces a variety of conſiderations, and admits of a great number of refinements. It is impoſſible for any man to take upon himſelf to decide upon the conſtruction of a proclamation reſpecting prize, without informing himſelf as accurately as poſſible of all the determinations that have taken place in courts of juſtice, and of the continued practice of the Admiralty with reſpect to the diſtribution of prizes under ſimilar proclamations. I lament the more that I am called upon to decide in this caſe, becauſe I confeſs that I feel this to be a very doubtful queſtion. I the more lament it, becauſe the conſequence of theſe doubts having impreſſed upon my mind an opinion correſpondent with that of my Brother *Rooke* is, that, as far as this Court is concerned, unleſs the parties ſhould deſire it, no judgment can be given. In conſtruing this proclamation I am under the neceſſity of inquiring what have been the former proclamations on the ſame ſubject, that I may conſtrue this act of the Sovereign by his antecedent acts, comparing the one with the other. I muſt therefore look back to the manner in which the firſt law upon the ſubject was promulgated by his Majeſty, in whoſe breaſt the whole matter reſted. Before the year 1740, it muſt be admitted, that when a proclamation gave to the flag officers the ſhare of prizes taken by ſhips acting under their command, it did not mean an actual command; it did not mean an exiſting command operating upon the particular ſervice then done; but it was underſtood, and it was, I think, admitted in argument, that before that time, and down to the year 1744, the moment that an officer was appointed to any command he was conſidered as directing every operation that was done by any of the ſhips which were under that command to which he was appointed. It was therefore an ideal direction, not an actual one that was ſufficient. With reſpect indeed to inferior captains and other officers of inferior rank, actual co-operation and

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affiſtance in the capture itſelf was neceſſary. The words of the proclamation which ſpeak of ſuperior officers are, "directing or aſſiſting." Then what has been underſtood to be meant by the word "directing?" It need not be immediate direction by the party himſelf; for it has been uniformly admitted in the argument, that a direction given by one officer devolves upon his ſucceſſor who comes in his place, and will be conſidered as his direction. Then I am to underſtand that up to the year 1744 this was the received law reſpecting the diſtribution of prizes among ſuperior officers; namely, that every ſuperior officer was conſidered as directing, who had that command which the perſon giving the direction had; and that he took it with all its rights, although he himſelf had never done any one act in purſuance of that command; that every direction given by the perſon in whoſe room he came devolved upon him; and there was a conſtructive direction attaching to his perſon. That, I think, is the fair import of the law as it ſtood prior to the year 1744. In the proclamation of the year 1740 the words are, "amongſt ſuch flag officers as ſhall be actually on board or directing and aſſiſting;" but that is corrected, and I am happy to find it is, becauſe if it had not it would have raiſed a difficulty; the word "and" is changed into the word "or," and it now ſtands—that the prize is due to thoſe that are on board, or to any perſon who either actually or legally ſhall be conſidered as "directing or aſſiſting in the capture." Then, before the year 1744, ſuch was the law: whether abſurd or not, whether it led to conſequences injurious to the ſervice or not, I do not take upon myſelf to decide. But, unqueſtionably, that was the underſtood practice, and I call it the law of the navy. In the proclamation of 1744 the King thinks fit to add a reſtriction to this law, which imputes a virtual direction to perſons who really have given no actual aſſiſtance. Now, let us ſee to what extent he ſo reſtrains it. I ſuppoſe an inconvenience had been felt, that officers were appointed at home and perhaps never went out at all: and therefore the King thought fit to alter the law to a certain degree. The proclamation of 1744 goes on pretty nearly in the ſame words with reſpect to veſting the prize as that of 1740, *viz.* "But, in caſe any prize ſhall be taken by any of his Majeſty's ſhips of war under the command of a flag or flags, the flag officer or officers being actually on board, or directing or aſſiſting in the capture, ſhall have one-eighth." Then it proceeds to ſtate, what ſhall be the

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the caſe of a flag officer returning home; and in order to narrow the right which would have been given by the ſuppoſed devolution upon him of all the powers given to his predeceſſor, it declares as a reſtriction upon the right, "that no flag officer returning home ſhall ſhare in any prizes that ſhall be taken by the ſhips which he has left behind, after he ſhall have got out of the limits of his ſtation." Nobody, I apprehend, will deny that, as the caſe ſtood upon that proclamation, if a flag officer had returned home leaving his ſhips under the command of a captain and not a flag, he would equally have ceaſed to be entitled to his ſhare. Moſt certainly he would. The meaning is this; we will not permit an officer, after he has left his ſtation, to ſhare in any prizes, under whatever command the ſhips may be left, whether under the command of a perſon of his own rank, or an inferior rank. It is a poſitive regulation, that under all given circumſtances whatever, the chief flag officer returning home after he has paſſed the limits of his command, ſhall ceaſe to have any ſhare of prizes taken by the ſhips left behind, without conſidering whether thoſe ſhips, when he is ſuperſeded, ſhall be under the command of a perſon of a ſuperior flag or not. I underſtand, that many eminent perſons think that was the beſt policy, and that as ſoon as the commander in chief went beyond the limits of his command, and ceaſed to be capable of giving directions, he ſhould be conſidered as if actually dead with reſpect to prizes. Thus the matter ſtood upon that proclamation; in the application of which no doubt could have ariſen except from the difficulty of aſcertaining the very moment he had paſſed the limits, which, however, I do not apprehend to be attended with ſo much difficulty as may be ſuppoſed. But his Majeſty was not ſatisfied that this was the proper rule, and in the year 1756 the preſent proclamation was ſubſtituted in the room of it. And now we are to conſider what ought to be the conſtruction put upon the words which his Majeſty has thought fit, in the proclamation of 1756, to ſubſtitute in the room of thoſe plain words I before ſtated, and which would have left no room at all for doubt. If it had been the object of his Majeſty to lay down that, from the moment an admiral quitted his ſtation he ſhould loſe his prize-money, he could not have made the words plainer, except by aſcertaining the particular time at which this ceſſation of his right ſhould take place: inſtead of this, however, the words before ſtated are ſubſtituted,

ſtituted, and they are the words which unfortunately give riſe to this queſtion. The former proclamation had reſtrained the right to the caſe of the commander in chief giving directions, and acting in his ſtation. Inſtead of that, the King has thought fit, as I think, to take away part of that reſtriction. When I look back and conſider the adjudged caſes that have taken place ſince, I am bound to ſay that this was not meant to make the rule more rigorous, but was rather a relaxation of it. I do not enter into the policy of the alteration, having nothing to do with that. When Lord *St. Vincent* had ſet ſail to come home, can any body doubt that he might have returned back? Indeed the rule no longer reſts on the circumſtance of the commander having paſſed the limits of his ſtation. The perſon who ceaſes to have a right to prize-money is "an admiral returning home, leaving ſhips to act under another command." It is ſaid theſe words, "under another command," are nugatory. They are ſo if they mean only what is now contended for, becauſe the ſhips muſt be left under another command; he could not go away without leaving them under ſome other command. Then, was it meant that an admiral returning home, if he did not leave the ſhips *to act* under another command, (for I cannot help thinking that there is a great deal in the words "to act,") ſhould not ceaſe to ſhare in prizes? If it meant only what the former proclamation did, he muſt have left ſhips to act under ſome other command; for the law would create a command in the perſon next in ſeniority to him. Therefore I cannot help thinking his Majeſty muſt have meant another command with reference to ſomething ariſing out of the nature and uſage of the ſervice. And what is conſtrued another command under theſe words is the only queſtion. Now I think a great deal ariſes from the word "home," if we attend to the policy of this regulation. If it were meant to encourage perſons to remain upon their ſtations, and not to invent excuſes for returning, but that they ſhould do ſo at the peril of loſing their ſhare of prize, why ſhould the words "return home" only have been uſed? why ſhould not the proclamation have ſaid, "abſent from their ſtation, leaving ſhips under another command?" Suppoſing Lord *St. Vincent*, inſtead of coming home, had obtained leave to go to *Liſbon* for his health, he then would not have fallen within theſe words; he would not have been an admiral returning home, leaving ſhips or veſſels to act under another command; but he would have been an admiral leaving ſhips

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under the command of the next flag officer. I ſuppoſe nobody will contend that he could not have ſhared then. Therefore, when I ſee what theſe words are, I cannot but conceive that the framers of that proclamation meant to make a very eſſential alteration in the regulations reſpecting an admiral quitting his ſtation; and that it was not the intention that it ſhould include every man that ſhould leave his ſtation for any reaſon whatever; but that an admiral under the particular circumſtances of returning home leaving the ſhips under another command, though he continued in the commiſſion, ſhould not ſhare in prizes. I now come to conſider the meaning of the words "another command." It is ſaid that by theſe words muſt be meant the command of another flag officer. Now I confeſs I do not ſee any neceſſity for that. I think his Majeſty muſt have meant by the words "another command," that when an officer comes back from his ſtation, not temporarily, not with a determination of returning, but with an intention of leaving the fleet to act under the command of a perſon to be appointed in his room, that officer ſo returning ſhall not ſhare. The former words would have anſwered every purpoſe if the object had been what it is contended ought to be the object of the proclamation. And therefore his Majeſty having thought fit to alter theſe words, we are bound to conſtrue them according to the uſage of the navy with reſpect to the ſubject matter, and to put ſuch an interpretation upon them as will give a real effect to the words, and not a nominal one. This is the conſtruction I put upon the proclamations themſelves, without any aſſiſtance from adjudged caſes. It remains then to be conſidered whether any interpretation has been put upon them by ſubſequent uſage. There was ſome evidence of uſage which I did not think ſufficient to conſtitute an uſage. Let us then conſider the adjudged caſes; each party inſiſting as they do, that the adjudged caſes, as far as they go, are in his favour. The caſes are, *Taylor* v. Lord *Harry Paulett*, *Pigott* v. *White*, *Johnſtone* v. *Margetſon*; and laſtly, the caſe of the *Saint Anne*; a caſe which, if we can collect the opinion of the learned judge who decided it, is undoubtedly of the greateſt authority, and ſuch as I ſhould be glad to recur to in a queſtion like the preſent, which I do not profeſs to decide without conſiderable doubts. In the firſt caſe of *Taylor* v. Lord *Harry Paulett*, the Plaintiff, who was captain of a ſhip under command of Lord *H. Paulett*, ſailed under orders to cruize from his lordſhip, who, before the prize was taken,

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was superseded by Admiral *Smith*, upon which the Plaintiff insisted he was entitled to the whole share. There Lord *Mansfield* was clearly of opinion that the captain was certainly under the command of some flag officer; but whether under the command of Admiral *Smith* or Lord *Harry Paulett*, was not material to the claim of the Plaintiff. He certainly did act under the command of one or the other: consequently the whole share did not belong to him. The opinion of Lord *Mansfield* in that case shews that there is no necessity in point of law that a flag officer should share, only that if there should be any flag officer commanding, he should be entitled to his eighth. The next case is that of *Pigott* v. *White*, which certainly throws some light upon a subsequent point of this case, which I will just mention before I close what I have to say, namely, Lord *Nelson*'s right to share, supposing Lord *St. Vincent* not to have any right, upon which a great question was raised at the trial, which may possibly be the subject of discussion hereafter before another tribunal. But the case of *Pigott* v. *White*, I think, determines only this; that when Admiral *Pigott* came upon his station and gave orders to Admiral *Digby*, he, as it were, adopted the orders given by Admiral *Digby*, and took them to himself; and that very ship to which Admiral *Digby* had given orders was from that time to be considered as acting under his orders. It goes a great way, however, towards proving that if Lord *Nelson* may be considered as a person having another command, he must be considered as having virtually directed Captain *Digby*, as well as the other ships. But I think that case proves nothing more. Then comes the case of *Johnstone* v. *Margetson*, which was argued twice here. It is very true that the judgment does not touch this point. It only decides that previous to the capture, *Johnstone* had, to all intents and purposes, ceased to have either an actual or virtual command over the officer commanding the capturing ship. The argument proceeded upon grounds nearly similar to the present, but the Court did not choose to decide upon them. The point there contended for was at least doubtful at that time, and certainly may have been considered as such ever since. It was argued, that there must be another flag officer, under whose command the captain must pass. But it was there answered, that the fourth clause of the proclamation does not imply that another flag officer must be left in command, for that the command of the senior captain left behind was sufficient to answer the words of the proclamation, and it was not necessary

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that another flag officer ſhould be appointed to put an end to Commodore *Johnſtone*'s command, which determined by his appointment to the expedition againſt the *Cape of Good Hope*. Where a flag officer quits his ſtation to return home, the command devolves upon the ſenior captain. But if it be thus when he is returning from his ſtation, it muſt be ſo when his command is actually determined. Theſe were the arguments; and I think they were very concluſive. At leaſt I think that, independent of the authorities, they were well founded. I admit, however, that the caſe determined nothing, for though the point was raiſed, we cannot find the leaſt inclination in the Court to decide either one way or the other. Then comes the caſe of the *Saint Anne*. I admit that the learned judge has not decided that caſe upon the point which ariſes here, becauſe he decided it upon the ground that Admiral *Murray* had not abdicated his command. But I ſay that would not have been the ground of this deciſion if his opinion had coincided with what the King's advocate at the latter end of his argument threw out, namely, that the command muſt devolve upon a flag officer, or it will be at an end. I have looked carefully into that caſe. All the arguments of the King's advocate, till the very laſt, are in favour of the Defendant in this action: for he contends throughout, that an officer, in order to be barred, muſt have left the ſhips under the command of ſome perſon ſuperſeding him in the very command which he was then leaving; and that if it was a temporary abſence only, he would not be barred. The circumſtances of that caſe were almoſt the ſame as in the preſent caſe, with this difference only, that Captain *Mowatt* was not an admiral. Admiral *Murray*'s orders to him were as ſtrong and as extenſive as thoſe which Lord *St. Vincent* gave to Lord *Keith*. He put under his command *per* margin the very ſhip, by name which took the prize. "You are to take under your command the ſhips in the margin," of which *La Raiſon* was one. So that, to all intents and purpoſes, there was as complete a command devolved upon Captain *Mowatt* as upon Lord *Nelſon*: with the difference only, that one had a flag, the other had not. Admiral *Murray* having left the ſhips under Captain *Mowatt*, as, in the preſent caſe, was left to Lord *Nelſon*, with a command as extenſive, wrote this letter: "Whereas I think it neceſſary to proceed to *England* in his Majeſty's ſhip *Cleopatra* without loſs of time, you are hereby required and directed, during the time of my abſence, or until the arrival of another

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another commander in chief on this ſtation, to take the ſhips and veſſels named in the margin under your command, and any other ſhips commanded by a junior officer to yourſelf." Then, had he left the ſhips under another command? It was determined he had not. But it was ſaid the learned Judge determined that cauſe upon this ſimple circumſtance, that the perſon whom he then left in command was not a flag officer. It is not neceſſary for me to ſtate at length the arguments, but in every one of them, except the laſt, it is ſtrongly urged by the King's Advocate that the words of the proclamation muſt be underſtood of one who had actually and intentionally quitted and abdicated his command. Then he goes on to give inſtances of his not having done ſo, ſuch as his ſecretary's ſalary being continued, and that the duties and emoluments of his office muſt be deemed reciprocal; that he muſt be ſtill conſidered as a perſon not having abdicated his command or left it for the purpoſe of putting it under another command within the meaning of the proclamation. Then he ſays the whole clauſe muſt be underſtood to refer to another appointment under a flag officer, and like a judicious advocate he avails himſelf of that argument. Then comes the judgment of the Court; and if Sir *William Scott* had put the ſame conſtruction upon the proclamation which we are called upon to adopt on the part of the Plaintiff, I cannot conceive that he could have given the ſort of judgment that he did give, for it would have been a much ſhorter anſwer to have ſaid that Admiral *Murray* muſt have left the ſhips under another command, with which command Captain *Mowatt* was not inveſted, the meaning of the proclamation being "left under the command of another flag." If that had been Sir *William Scott*'s opinion, I cannot but believe that it would have been the foundation of his judgment. But I think it was his opinion, that Captain *Mowatt*'s was another command, not becauſe he was not an admiral, but that it would have been another command if Admiral *Murray* had come home with an intention of abdicating his own command. The judgment is very ſhort, and plainly proceeds on the mere point of Admiral *Murray*'s not having abdicated the command: and there is not one ſyllable which falls from Sir *William Scott* from whence it can be collected that he would have been of a different opinion if Captain *Mowatt* had been a flag officer. I cannot help, therefore, thinking, that the conſtruction which that learned Judge put upon the proclamation was not that which is

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now attempted to be put upon it by the Plaintiff. And I conſider that caſe, though not a determination upon the point, yet indicative of the opinion of a very great Judge reſpecting the conſtruction of this proclamation. This being the caſe, let us conſider what circumſtances took place to indicate whether Admiral Lord *St. Vincent* was or was not an officer returning home with an intention of leaving ſhips to act under the command of ſome ſuperior officer to be appointed in his room; for I do admit that if he came home, or was recalled, not for a temporary purpoſe and with an intention of returning back again, but leaving ſhips to act under another command, not his own, Lord *Nelſon* would be entitled. But Lord *Nelſon* was, according to my apprehenſion, acting during the whole time under the command of Lord *St. Vincent*. It is true that the letter which Lord *St. Vincent* wrote has the word "relinquiſh" in it: and it does appear from thence that he had ſome thoughts of totally relinquiſhing the command. But Lord *St. Vincent* ſaid, he ſhould not relinquiſh the command till circumſtances made it neceſſary. He was told, "Whenever your health requires it, you may come to *Great Britain*." Nor did he come to *Great Britain* with an intention of relinquiſhing that command. Is there any thing in this from whence it can be collected that he came home, the Admiralty having an intention to appoint another commander to ſuperſede him? When Lord *St. Vincent* came home he was received as commander in chief; he was correſponded with as commander in chief; he gave orders as commander in chief; and it was a conſiderable time before he actually reſigned that command and another officer was appointed. Now, who was the commander under whoſe virtual orders Captain *Digby* acted? I ſay Lord *St. Vincent;* he never left that command. I think Lord *Nelſon* was acting under Lord *St. Vincent*'s orders; the latter being the commander of that ſquadron, though he was not within the limits of the ſtation, which was made unneceſſary by the proclamation of 1756. He was not an admiral "returning home;" for I lay great ſtreſs upon that. I cannot conceive that if the words had been meant to apply to every caſe where ſhips were left acting under a flag officer, they would be confined to the caſe of an officer returning home; for the ſpirit of the proclamation then would be, that whenever one flag officer left the fleet under the command of another flag officer, the former ſhould have no ſhare. The only queſtion then is, Whether Lord *St. Vincent* falls within

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the words "leaving the ſhips to act under another command." The facts are indicative that he was in the very ſituation in which Admiral *Murray* is pronounced to have been by Sir *William Scott*. He had not left the ſhips to act under another command. And I conceive that authority goes to prove that Admiral *Murray* had not left the ſhips under another command, not becauſe the perſon happened not to be a vice-admiral, but becauſe Admiral *Murray* had not abdicated the command. Then the conſtruction I put upon it is the ſame with my Brother *Rooke*'s. I do not pretend to ſay I look upon this as a very clear caſe; far from it; I have turned it over and over again in my mind. I am under the neceſſity, however, of putting the beſt conſtruction I can upon the proclamation, and of making it conformable to what I conceive to be the real intention of his Majeſty. Upon the whole, I am of opinion that the proclamation of 1756 did not mean to enforce or to extend the proclamation of 1744; that it meant to explain it, or rather to relax it, and to ſay, that a commander in chief, merely going out of his ſtation, and ceaſing to execute the active duties of it, ſhould not therefore be excluded from prize; but only where he put the fleet under the command of ſome other perſon who was to take his ſtation, and fill that poſt which he before had filled. I cannot put any other conſtruction upon the words "returning home." And I confeſs I have not heard that difficulty anſwered which was urged at the bar, and which my Brother *Rooke* referred to; namely, If Admiral *Murray* had left a vice-admiral, then he would have left the ſhips under another command: but if that vice-admiral had died, then would Admiral *Murray*'s right have revived or not? I am extremely ſorry to be under the neceſſity of giving an opinion by which the parties will be deprived of the benefit of any judgment in this Court. My opinion, however, is, that by the true conſtruction of this proclamation the words "another command" do not refer to the command of a perſon acting under the orders of the officer who quits the ſtation; but that the proclamation was only intended to exclude from ſharing in prizes a commander who, without any intention of returning, comes home and is ſuperſeded by another officer. The conſequence is, that there can be no judgment given by the Court, unleſs the parties pray to have a judgment given.

On an intimation from the counſel for the Plaintiff that they wiſhed the judgment of the Court to be pronounced againſt their

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client, in order that the caſe might be carried into a court of error, Mr. Juſtice *Heath* withdrew his opinion and the *Court* gave Judgment for the Defendant.

Nov 25th.

PARKER *v.* PISTOR.

If a *fi. fa.* iſſue againſt one of ſeveral partners, the Court will not at the requeſt of the partnerſhip-creditors give the ſheriff time to return the writ until an account can be taken of the ſeveral claims upon the partnerſhip property.

THIS was a rule calling on the Plaintiff to ſhew cauſe why the ſheriffs of *London* ſhould not have time to return a writ of *fieri facias* to the firſt day of next term.

The Defendant was one of two partners, and the application was made on the part of ſeveral creditors of the partnerſhip, and the object was to prevent the partnerſhip goods from being ſold until an account could be taken of the ſeveral claims upon this property.

Beſt Serjt. who obtained the rule, obſerved, that the ſheriff was only entitled to take poſſeſſion of an undivided, not of a ſeparate moiety of the partnerſhip goods; that he could only hold that moiety in the ſame manner as the Defendant himſelf had done, and that as the Defendant was not entitled to ſell the partnerſhip goods without the conſent of his partner, the ſheriff ought not to be obliged to do ſo by a writ of *venditioni exponas*. He mentioned a caſe in the Court of King's Bench where a ſimilar application had been made, which ſtood over ſeveral terms, and the rule was at laſt made abſolute by conſent, the Plaintiff having been driven to give that conſent in conſequence of Lord *Kenyon* ſaying that the Court would enlarge the rule from time to time until the parties did conſent. He alſo referred to *Eddie* v. *Daviſon*, *Doug.* 650. and *Taylor* v. *Field*, 4 *Veſ.* Jun. 396. where it was holden that the joint property of an inſolvent partnerſhip taken in execution for a ſeparate debt could not be retained againſt the joint creditors.

Lens Serjt. *contrà*, inſiſted that this was merely the common caſe of partnerſhip goods taken in execution; that if the Defendant had any intereſt whatever the ſheriff was bound to take the partnerſhip goods and ſell them; if not, he ought to return *nulla bona*. He obſerved that in *Taylor* v. *Field* it was admitted that the above rule would prevail at law, and in *Pope* v. *Haman*, *Comb.* 217. this diſtinction is pointed at, *Holt* Ch. J. ſaying, "upon a

judgment againſt one co-partner the ſheriff may take the goods of both in execution, and the other co-partner hath no remedy at law otherwiſe than by retaking the goods if he can; for the vendee of the ſheriff becomes tenant in common with the other co-partners."

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The Court were of opinion that there was no ground for their interpoſition; that it was a very plain caſe at law, and that all the difficulties were to be encountered in equity; that the ſafeſt line of conduct for the ſheriff to purſue was to put ſome perſon in poſſeſſion of the Defendant's ſhare as vendee, leaving him and the parties intereſted to conteſt the matter in equity, where a bill might be filed, ſtating that he had taken poſſeſſion of the property, and praying that it might not be diſpoſed of until all the claims were arranged.

Rule diſcharged.

CHAPMAN *v.* KOOPS.

Nov. 29th.

THIS was a rule calling on the Plaintiff to ſhew cauſe why it ſhould not be referred to the prothonotary to inquire if the Defendant had any and what intereſt in the effects and premiſes ſeized by the ſheriff under an execution at the ſuit of the Plaintiff. It appeared that the Defendant was one of twenty-ſix perſons carrying on the ſtraw paper manufactory, an undertaking for which a patent had been granted to five perſons originally, and then an act had paſſed enabling them to multiply the ſhares. Under that act the ſhares had been multiplied to twenty-ſix, and the Defendant, for a ſeparate debt of his own of 9000*l.* having been ſued to execution, the ſheriff had ſeized and put an officer into poſſeſſion of the Defendant's undivided intereſt in the manufactory. This application was made by the twenty-five other patentees, who ſtated that *Koops* was indebted to the concern in more than the amount of his ſhare.

Shepherd Serjt. ſhewed cauſe, and inſiſted that if the Defendant had any intereſt in the property the execution was regular; if not, it was the duty of the ſheriff to have returned *nulla bona*; and that if the other partners were deſirous of removing the inconvenience of the execution, they might become purchaſers when the ſheriff proceeded to ſale.

A fi fa. having iſſued againſt the effects of the Defendant, who was jointly concerned in a manufactory with 25 other perſons, to whom he was indebted to a greater amount than his whole ſhare, and the ſheriff having ſeized the whole of the partnerſhip property, the Court refuſed to refer it to the prothonotary to inquire what was the Defendant's intereſt in the effects ſeized.

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Cockell and *Onſlow* Serjts., in ſupport of the rule, urged that unleſs the Court interfered the whole manufactory would be at a ſtand; that it was not in the power of the parties who now applied to the Court, to compel the ſheriff to return the writ; that ſeveral caſes had taken place in the King's Bench, where it had been referred to the maſter to take ſimilar accounts without any conſent being ſtated in the rule, and though in a late caſe it was expreſſed to be by conſent, yet it appears that the Court drove the parties to that conſent by threatening to enlarge the rule from time to time till they did ſo; and that with reſpect to the juriſdiction of the Court, it had always been deemed competent to them to interfere to prevent an improper uſe of their own proceſs.

Lord ALVANLEY Ch. J. I hope this will be the laſt application that will be made to this Court of a ſimilar nature with the preſent. It appears to me to be moſt clear that without the conſent of all parties the Court has no right to reſtrain the Plaintiff from taking advantage of the execution which he has iſſued. When perſons enter into partnerſhip they muſt be aware that the ſeparate concerns of each partner may in ſome caſes introduce a variety of claims very inconvenient to the general partnerſhip concern. By the law of *England* the creditor of any one partner may take in execution that partner's intereſt in all the tangible property of the partnerſhip, and will thereby become a tenant in common with the other partners. This the Plaintiff has done, and we are deſired to reſtrain his execution, becauſe it is alleged that he ſtands in the ſhoes of a partner, who would not have a right to moleſt the other partners until all accounts between them had been ſettled. But if the other partners with to take advantage of this circumſtance they ought to file a bill in equity againſt the vendee of the ſheriff, or they may buy in the property when put up to ſale. It has been ſaid that the Court of King's Bench would ſuſpend the Plaintiff's execution until he conſented to an account being taken before the Maſter; but I do not think we are authoriſed to take ſuch a ſtep in this caſe. Indeed I can hardly conceive a caſe in which we ſhould be authoriſed ſo to do.

ROOKE J. (*a*) If it had been ſhewn that the Plaintiff had been making uſe of the proceſs of the Court for the purpoſes of oppreſſion, it would afford ground for the Court to interfere; but here he is only aſſerting a fair common law right, from the exerciſe of

(*a*) Mr. Juſtice *Heath* was abſent.

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which there is no pretence for reſtraining him, ſince no miſconduct has been ſuggeſted. Nor are we authoriſed to refer to our officers ſuch matters of account as are the proper ſubjects of inveſtigation in a court of equity.

CHAMBRE J. Nothing has been ſtated to ſhew that any improper uſe has been made of the proceſs of the Court. The law has determined what property the ſheriff may take poſſeſſion and diſpoſe of under an execution; and we cannot erect ourſelves into a Court of equity for the purpoſe of taking accounts without the conſent of the parties. The caſe of *Eddie* v. *Davidſon*, *Doug.* 651. (which has been referred to in ſome of theſe caſes) is eſſentially different; there the application was made by the aſſignees of one partner to have a moiety of the produce of the goods taken in execution for a debt of the other partner, but no objection was made to the ſale by the party applying, or to an account being taken by the Maſter by the party levying, though he denied the title of the inſolvent partner to any of the goods. The ſhort objection to this application is, that the Court cannot direct a partnerſhip account to be taken without aſſuming a juriſdiction that does not belong to it.

Rule diſcharged.

TOUTENG and Another v. HUBBARD.

Nov. 29th.

If a *Britiſh* merchant charter a *Swediſh* ſhip on a voyage to *St Michael's* for a cargo of fruit, and the charter party contain the uſual exception againſt the reſtraint of princes, and the ſhip be prevented from reaching *St. Michael's* within the fruit ſeaſon by an embargo laid on *Swediſh* veſſels by the *Britiſh* Government, the *Swediſh* owner cannot, by proceeding on the voyage after the embargo is taken off, entitle himſelf to recover the freight againſt the *Britiſh* merchant.

THIS was an action brought to recover damages againſt the Defendant for not employing a ſhip in purſuance of an agreement for that purpoſe. It came on to be tried before Lord *Alvanley* Ch. J., and a ſpecial jury, at the ſittings after laſt *Michaelmas* term, when a verdict was found for the Plaintiffs for the ſum of 748*l.* ſubject to the opinion of the Court on the following caſe.

The Plaintiffs being owners of the *Swediſh* veſſel called the *Economy of Stockholm*, on the 13th *December* 1800, entered into the following memorandum for chartering the ſaid ſhip to the Defendant.

"*London*, 13th *December* 1800.

"Memorandum for Charter.

"It is this day mutually agreed between *Hans Peter Schonberg* for and in behalf of the owners of the good ſhip or veſſel called

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the *Economy of Stockholm*, of the burthen of 180 tons or thereabouts, now lying in the river *Thames*, whereof the ſaid *Hans Peter Schonberg* is maſter, and Mr. *William Hubbard* of *London*, merchant; that the ſaid ſhip being tight, ſtaunch, and ſtrong, and every way fitted for the voyage, ſhall with all convenient ſpeed, ſail and proceed to *Ponte del Gada*, in the iſland of *St. Michael's*, or ſo near thereunto as ſhe may ſafely get and there receive from the factors or agents of the ſaid merchant a full and complete cargo of fruit in boxes, (*London* market boxes), not cheſts, the merchant or his agent at *St. Michael's* to furniſh the neceſſary papers for declaring the cargo to be neutral property, not exceeding what ſhe can reaſonably ſtow and carry over and above her tackle, apparel, proviſions, and furniture, and being ſo loaded ſhall therewith proceed to the port of *London*, or ſo near thereunto as ſhe may ſafely get and deliver the ſame on being paid freight by the merchant, his executors, adminiſtrators, or aſſigns, at and after the rate of nine ſhillings and ſixpence *per* box, with five *per* cent. primage, with two thirds port charges and pilotage, as cuſtomary (reſtraint of princes and rulers during the ſaid voyage always excepted), one half of the freight to be paid at unloading and right delivery of the cargo, and the remainder by a good bill on *London*, at one month after date from the time of delivery. Forty running days are to be allowed the ſaid ſhip at *Ponte del Gada*, and delivering at *London*. Demurrage ten days at three pounds *per* day, over and above the ſaid laying days. Penalty for non-performance of this agreement, one thouſand pounds.

" *Hans Peter Scouberg.*

" Signed, being firſt duly ſtamped, " *William Hubbard.*
in the preſence of

" *Samuel Marſhall.*"

On the 22d day of *December* 1800, which was as ſoon as the ſhip could conveniently ſail, ſhe departed from *London* on her ſaid voyage, being tight, ſtaunch, and ſtrong, and every way fitted for the voyage; but after ſhe had proceeded ſome diſtance ſhe was driven back by contrary winds, and on the 15th *January* 1801, ſhe was ſtopped in *Ramſgate* harbour by an embargo from the government of this country upon all *Swediſh* veſſels, and detained by virtue of the ſame till the 19th of *June* following. The ſeaſon for ſhipping fruit at *St. Michael's* was then over, the lateſt time for ſhips ſailing from this country in order to have the benefit of a

ſeaſon being the latter end of *February*; but the captain, as ſoon as he conveniently could after the ſhip was releaſed, to wit, on the 2d *July* 1801, informed the Defendant that the ſhip was ready to proceed upon her voyage in purſuance of the memorandum for the charter, and offered to deliver up the letters of advice the Defendant had before given him to his correſpondents at *St. Michael's*, if the Defendant would give him others in their ſtead. The Defendant declined giving him any anſwer till he had conſulted his attorney, and on the 4th *July* the Defendant gave the captain the following written notice, *viz.* "Mr. *Hans Peter Schonberg*. As the ſhip *Economy*, which I chartered of you on the 19th *December* 1800, in conſequence of the late embargo laid by the government of *Great Britain* on all *Swediſh* veſſels, could not nor did proceed on her voyage, according to the terms of the ſaid charter-party, whereby the ſame charter-party was terminated and at an end; but as I underſtand it is your intention now to proceed to *St. Michael's*, I hereby give you notice that the ſhip cannot be poſſibly loaded there, the ſeaſon for ſhipping fruit being long ſince paſſed; and your now making ſuch voyage muſt, as you well know, be wholly uſeleſs and nugatory. Dated the 4th day of *July* 1801.

(Signed) "*William Hubbard*."

In the month of *January* 1801, after the ſame embargo had taken place, the Defendant applied to the captain to give back his letters of advice, but he refuſed to deliver them up, and ſaid he would deliver them to the agent for the owners in town. From that time no notification was made by either party that the contract ſhould not be proceeded upon till the captain applied to the Defendant, as before mentioned. The whole freight of the ſhip, under the memorandum for the charter, would have amounted to 748*l.* 2*s.* 6*d.*, but the actual damage the Plaintiffs ſuſtained out of pocket by the expences of ſailing upon the voyage till the ſhip was driven back, by paying the ſailors during the embargo, and by the damages ſuſtained, amounted to the ſum of 397*l.* 6*s.* 6*d.*, for which the verdict was given.

The queſtion for the opinion of the Court was, whether the Plaintiff was entitled to recover either the ſaid ſum of 748*l.* 2*s.* 6*d.* or the ſum of 397*l.* 6*s.* 6*d.* or any part thereof; if not a nonſuit to be entered.

This

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This caſe was twice argued; firſt in *Eaſter* term laſt by *Bayley* Serjt., for the Plaintiffs, and *Beſt* Serjt., for the Defendant; and again in *Trinity* term, by *Shepherd* Serjt., for the former, and *Lens* Serjt., for the latter.

Arguments for the Plaintiffs. The embargo laid upon *Swediſh* ſhips by the government of this country on the 15th of *January* 1801, did not put an end to the contract between the Plaintiffs and the Defendant. When the embargo was taken off, the captain was bound to proceed upon the voyage without demanding any additional freight, and the merchant was bound to employ the ſhip, and pay the freight ſtipulated for by the contract. In the preſent caſe it was unneceſſary that the ſhip ſhould actually have proceeded upon the voyage to entitle the Plaintiffs to recover, becauſe the Defendant in expreſs terms diſcharged them from that obligation. It may perhaps be contended that as the object of the voyage was to obtain a cargo of fruit, and it became impoſſible, in conſequence of the embargo, that the ſhip ſhould arrive at *St. Michael's* until after the fruit ſeaſon, the Defendant was diſcharged; but as the delay was not owing to any neglect of the captain, and no time of arrival was ſtipulated for in the contract, he would be entitled to freight at whatever time he might arrive. The ſhip might have been prevented from arriving in time by other accidents, as well as by an embargo, ſuch as wind, weather, and detention of pirates, *&c.* and yet in ſuch caſe the Defendant muſt have paid the freight; if therefore it was intended that the conſequences of an embargo ſhould have been ſuſtained by the Plaintiff, there ſhould have been an expreſs clauſe to that effect in the agreement. The caſe of *Hadley* v. *Clarke*, 8 *T. R.* 259. clearly ſhews that no terms can be introduced into a contract by implication. In that caſe the owners of a ſhip refuſed to fulfil their contract in conſequence of an embargo having for a conſiderable time prevented the ſhip proceeding in her voyage. Mr. Juſtice *Lawrence* there ſays, "it was incumbent on the Defendants, when they entered into this contract, to ſpecify the terms and conditions on which they would engage to carry the Plaintiff's goods to *Leghorn*; they accordingly did expreſs the terms, and abſolutely engaged to carry the goods, the dangers of the ſeas only excepted; that therefore is the only excuſe which they can make for not performing the contract; if they had intended that they ſhould be excuſed for any other cauſe, they ſhould have introduced

troduced such an exception into their contract;" and he cites *Paradine* v. *Jane*, *Alleyne*, 27. in which case it was decided that where a party by his own contract creates a duty and charge upon himself, he is bound to perform it, notwithstanding any accident by inevitable necessity, because he might have provided against it in his contract. Though the case of *Draddy* v. *Deacon*, 2 *Vern.* 242. tends to shew, that an embargo dissolves the contract between the freighter and ship owners, yet it will be sufficient to say that *Draddy* v. *Deacon* was over-ruled in *Hadley* v. *Clarke*. An embargo is an act of precaution, and must be considered merely as a temporary measure, in which respect it differs from an act of hostility; and this distinction is taken *Valin. Comment. tom.* 1. *p.* 626, 627. It does not amount to an interdiction of all commerce; but only to a suspension; and, therefore, the freighter must await the termination of the suspension, and then fulfil his contract. With respect to the exception contained in the agreement of "the restraint of princes and rulers," it was clearly introduced for the benefit of the captain, who was to proceed with all convenient speed, subject to that exception, and cannot therefore be adduced as an excuse for non-performance of that part of the contract, to which it was never intended to apply. On this part of the subject, and indeed upon the whole case, a late opinion of Lord *Kenyon* at *Guildhall*, in a case of *Blight* v. *Page*, is a strong authority (*a*). Nor can it be said, by way of answer to the Plaintiff's claim, that if the freight in this case be paid, the owners of a *Swedish*

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(*a*) *Blight and Others* v. *Page*, Sittings at *Guildhall* after *Michaelmas* term 1801, *coram* Lord *Kenyon*.

This was an action upon a memorandum for a charter-party.

By the memorandum it was agreed between the Plaintiffs, who were owners of the ship *Favourite*, and the Defendant, that the said ship, being tight, &c. should with all convenient speed sail and proceed to *Liebau*, or so near thereto as she could safely get, and there load from the factors of the Defendant a full and complete cargo of barley, in bulk not exceeding what the said ship could reasonably stow and carry, over and above her tackle, &c.; and being so loaded should therewith proceed to *Berwick*, or so near thereto as she could safely get, and deliver the same, on being paid freight at and after the rate of 8 *s.* 6 *d. per* quarter, with two thirds port charges and pilotage as customary, (restraints of princes and rulers during the said voyage always excepted,) one half of the freight to be paid on unloading and right delivery of the cargo, and the remainder in two months following. Thirty running days to be allowed the said merchant, if the ship was not sooner dispatched, for loading the said ship at *Liebau* and unloading at *Berwick*, and ten days on demurrage over and above the said laying days, at 3 *l. per* day.

The *Favourite* sailed on her voyage and proceeded to *Liebau*; but immediately on her arrival in the roads of that place the captain was informed by the factors of the Defendant that the *Russian* Government had prohibited the exportation of barley, and that it was therefore out of their power to furnish the intended cargo. The captain, how-

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a *Swediſh* veſſel will be paid for not doing that which they were prevented from doing becauſe they were *Swedes*, and thus obtain an indemnification for the acts of the *Britiſh* Government out of the pocket of a *Britiſh* merchant; for the caſe muſt be decided upon a general rule of law, equally applicable to the preſent caſe as to that of a *Britiſh* captain detained by an embargo in a port of *Sweden*, after having entered into a contract with a *Swediſh* merchant, and ſuing in this country. Although, upon the above principles, the Plaintiffs may perhaps be entitled to recover the whole freight, amounting to 748*l.* 2*s.* 6*d.*, yet they only inſiſt upon the ſum of 397*l.* 6*s.* 6*d.*, being the expences incurred by them in purſuance of a contract which the Defendant has refuſed to fulfil.

Arguments for the Defendant. It is not neceſſary to conteſt any part of the doctrine laid down in *Hadley* v. *Clarke*. In that caſe there was nothing which required that the contract ſhould be performed within a particular time; but the object of the contract in the preſent caſe was, that the Plaintiff's ſhip ſhould proceed to *St. Michael's* before the next fruit ſeaſon, and that the Defendant ſhould furniſh a cargo of fruit. Although no time for the performance of the contract be expreſſed, yet the nature of the contract neceſſarily impoſes a limit to the time within which it was to be performed; and the poſſibility of performing the contract

however, entered the port of *Liebau*, and after continuing there forty-nine days, returned in ballaſt to *Berwick*.

The action was brought to recover 459*l.* for freight, 27*l.* 18*s.* for charges, and 30*l.* for ten days' demurrage.

The Attorney-General (*Law*) for the Plaintiff inſiſted, that the exception of the reſtraints of rulers and princes was only applicable to the owners, and did not therefore excuſe the ſhippers.

Gibbs for the Defendant urged, 1ſt, that the exception was applicable both to owners and ſhippers: and, 2d, that as the prohibition of the *Ruſſian* Government equally prevented the captain from ſailing with the cargo, as the ſhippers from loading it on board, the averment in the declaration that the Plaintiffs were ready to perform their part of the contract was not true; and, 3dly, that there was no pretence for demanding demurrage, ſince it was the fault of the captain himſelf to remain at *Liban* after the notice which he had received.

Lord *Kenyon* Ch. J. I am decidedly againſt the Defendant upon the point of law. It is ſaid in *Co. Litt.* [1] that if a man be bound in an obligation to *A.*, conditioned to enfeoff *B.* a ſtranger, and *B.* refuſe, the obligation is forfeited; for the obligor has taken upon him to make the feoffment. The reaſon of this is clear. If a man undertakes what he cannot perform, he ſhall anſwer for it to the perſon with whom he undertakes. I am always deſirous to apply the ſettled principles of the law to the regulation of commercial dealings. With reſpect to the charge for demurrage, as it appears that notice was given before the captain entered the port that the factor could not furniſh a cargo, there is no pretence for making the Plaintiffs liable.

Verdict for the Plaintiffs for 486*l.* 18*s.*

[1] p. 209.

within

within that period having been prevented by an act of ſtate, the contract was neceſſarily put an end to; for where a party is prevented from performing his contract by the interference of the law, he is not reſponſible to thoſe with whom he contracts. The embargo in this caſe was not like thoſe in *Hadley* v. *Clarke* and *Blight* v. *Page*, but was in the nature of an act of hoſtility againſt the ſubjects of *Sweden*, and if the *Swediſh* captain be allowed to recover damages againſt the *Britiſh* merchant for non-performance of a contract which he was prevented from performing by the act of the *Britiſh* ſtate, the object of the ſtate will be defeated, and inſtead of operating againſt the ſubjects of *Sweden* will be turned againſt the ſubjects of this country. Indeed the clauſe which excepts the reſtraints of rulers and princes, muſt equally extend to both parties; and if it will excuſe the Defendant from not proceeding on the voyage, it will equally excuſe the Plaintiff from not furniſhing a cargo. In *Molloy*, *b.* 2. *c.* 4. *ſ.* 5. it is ſaid, "if the ſhip in her voyage becomes unable without the maſter's fault, or that the ſhip be arreſted by ſome prince or ſtate in her voyage, the maſter may either mend his ſhip or freight another." Now the *Swediſh* ſhips only being reſtrained by the embargo laid on in this caſe, the Plaintiff ſhould, in order to entitle himſelf to ſue the Defendant on his contract, have offered to ſend ſome other ſhip not within the reſtriction of the embargo. With reſpect to the caſe of *Paradine* v. *Jane*, there is a great diſtinction between that which is done after a man is let into poſſeſſion and that which prevents his getting poſſeſſion. If in that caſe Prince *Rupert* had prevented the leſſor from putting the leſſee into poſſeſſion the former could not have recovered rent againſt the latter without ſhewing that he had been put into poſſeſſion. The ſame principle and diſtinction may be applied to the caſe of *Blight* v. *Page*, where the ſhip having proceeded on her voyage, was prevented from completing it by an embargo in a foreign port, laid on by the Government of that country; but here the ſhip was prevented from commencing the voyage by the Government of the country where the contract was made. This diſtinction is expreſsly laid down in *Abbott's Treatiſe* on merchant ſhips and ſeamen, p. 339, 340. where it is ſaid that if the Government of the country to which the ſhip and cargo belong ſhould prohibit the exportation of the commodities compoſing the cargo, the law of that country would give no damages againſt the merchant; on the other hand, if a merchant hire a ſhip to go to a foreign port,

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and covenant to furniſh a lading there, a prohibition by the Government of that country to furniſh the intended articles neither diſſolves the contract nor abſolutely excuſes a non-performance of it.

Cur. adv. vult.

The opinion of the Court was now delivered by

Lord ALVANLEY Ch. J. The Defendant in this caſe having expreſsly diſpenſed with the Plaintiff's proceeding to *St. Michael's* for the cargo as ſoon as the embargo was at an end, no queſtion can ariſe as to the right of the latter to recover in this action on the ground of his not having performed his part of the contract. The only queſtion therefore will be, Whether the Defendant was bound by the terms of the charter-party to furniſh a cargo to the Plaintiff, notwithſtanding the intervention of the embargo? I will firſt conſider for what purpoſe and for whoſe benefit the words "reſtraint of princes and rulers during the ſaid voyage always excepted" were inſerted in the charter-party. It appears to me that they were introduced for the benefit of the maſter, not of the merchant, and that the true conſtruction of the charter-party is this: the captain engages to go to *St. Michael's*, reſtraint of princes excepted, and the merchant engages to employ him and furniſh the ſhip with a cargo. Lord *Kenyon*, in the caſe of *Blight* v. *Page*, put this conſtruction on an inſtrument nearly ſimilar with the preſent. If then this had not been the caſe of a *Swediſh* ſhip hired by an *Engliſh* merchant, the merchant would have been under the neceſſity of furniſhing the ſhip with a cargo if ſhe had arrived at *St. Michael's*, as ſoon as ſhe conveniently might after the embargo was taken off, although by arriving after the fruit ſeaſon was over the object of the voyage might be defeated. Such is the doctrine laid down in *Hadley* v. *Clarke* and *Blight* v. *Page*. The ground on which the Court decides this caſe (though any reaſons illuſtrative of that ground muſt be conſidered as my own) is, that a *Britiſh* merchant is not liable to anſwer for any damages which the owner of a foreign veſſel may ſuſtain from an embargo laid by the *Britiſh* Government on foreign ſhips in the nature of repriſals and partial hoſtility. Let us conſider the nature of an embargo of this kind. I have no difficulty in ſubſcribing to the doctrine laid down in *Hadley* v. *Clarke*, that a common embargo does not put an end to any contract between the parties, but is to be conſidered as a temporary ſuſpenſion of the contract only, and that the parties muſt ſubmit to whatever inconvenience may ariſe therefrom, unleſs

they have provided against it by the terms of their contract. The object of the voyage might equally have been defeated by the act of God as by the act of the ſtate; as if the ſhip had been weather-bound until the fruit ſeaſon was over, and yet in that caſe the merchant would have been bound to fulfil his contract. The principle of *Hadley* v. *Clarke* is this; that an embargo is a circumſtance againſt which it is equally competent to the parties to provide as againſt the dangers of the ſeas; and therefore if they do not provide againſt it they muſt abide by the conſequences of their contract. But is there no diſtinction between an embargo laid on for general purpoſes and an embargo in the nature of partial hoſtilities? By this embargo all *Swediſh* veſſels in the ports of *England* were detained, and the crews made priſoners. The object of this muſt have been to make a ſpecies of reprisal on the ſtate of *Sweden*; which we ſitting here, and every good *Britiſh* ſubject, muſt conſider as an act juſtified by the conduct of the Court of *Sweden* towards this country. If ſuch an embargo had been laid on by a foreign prince, though in the nature of hoſtility, I deſire not to be underſtood as giving any opinion whether in ſuch caſe the contract would have been defeated or merely ſuſpended, though I certainly have an opinion upon the ſubject. The ground of our determination is not merely that the embargo partook of the nature of hoſtility, but that it was in the nature of hoſtility by the Government of *Great Britain*, of which the merchant is a ſubject, where the charter-party was entered into, and in the Courts of which the *Swediſh* captain now ſeeks compenſation. Taking the caſe of *Hadley* v. *Clarke* to have gone all the length which I have ſtated, this great queſtion remains to be decided, Whether a *Britiſh* ſubject ſhall be compelled to indemnify a *Swede* againſt all the acts of the *Britiſh* Government which have been done to the latter with a view to reſiſt the injuſtice of the *Swediſh* Court; and whether by a charter-party of affreightment it ſhall be competent to a foreigner to defeat all the effects of the *Britiſh* embargo, and throw the burthen upon a *Britiſh* ſubject? We are of opinion that, on principles already eſtabliſhed, it would be a total violation of every rule by which the Courts have been governed reſpecting actions brought againſt *Britiſh* ſubjects by perſons in a more or leſs extenſive degree of hoſtility, to ſuffer this Plaintiff to recover. Whatever opinions may formerly have been entertained, it muſt now be taken as a decided point that an inſurance upon enemies'

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property is illegal; and this Court has determined that, though at the time of the insurance the assured belonged to a state in amity with this country, yet that the policy does not cover a loss arising from a capture made by a *British* cruizer in consequence of a war having broken out between this country and the state of which the assured is a subject (*a*). Let us next consider whether an insurance, for the benefit of a foreigner, against the effects of a *British* embargo, such as this, would be legal. In the case of *Rotch* v. *Edie* (*b*), the Court expressly declined giving any opinion upon the point. We are now called upon to give an opinion. I have no difficulty in saying, and my Brothers concur with me in thinking, that it would be illegal. What is the effect of such an insurance? It is to rescue the foreigner from those evils which it is the object of the *British* Government to inflict. If the King could not lay such an embargo without affecting his own subjects, he would not lay it at all; and the policy of the state would be defeated. I do not mean, however, to intimate that the *British* merchant might have maintained an action against the *Swede* for not proceeding on the voyage notwithstanding the intervention of this embargo. It might be a very sufficient answer for the latter to say that he only engaged to sail if not detained by the restraint of princes, and that the exception included the *British* Government. It might perhaps be urged, that the same principle which exempts the *British* merchant from the consequence of the acts of the *British* Government will prevent the *Swede* from taking advantage of them; but it might be going too far to hold that the acts of the *British* Government should not only deprive the *Swede* of the the benefit of what he might have earned, but make him liable in damages for the omission of that which he was prevented from doing. The case of *Paradine* v. *Jane*, *Aleyn*, 26. which was cited by Mr. Justice *Lawrence* in *Hadley* v. *Clarke*, appears to me to be founded on much good sense. The third resolution is, that "where the law creates a duty or charge, and the party is disabled to perform it without any act in him, and hath no remedy over, there the law will excuse him; but where a party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." There

(*a*) Vide *Furtado* v. *Rodgers*, *ante*, p. 191. (*b*) 6 *T. R.* 413.

is alſo a caſe of *Williams* v. *Lloyd*, Sir *Wm. Jones*, 179. where the Defendant, who had agreed to re-deliver a horſe upon requeſt which had been lent to him, was held to be excuſed, becauſe the horſe had died before any requeſt made. The principle eſtabliſhed by theſe caſes appears to be this; that if a party contract to do any thing, he ſhall be bound to the performance of his contract, if from the nature of that contract it is capable of being performed, and legally may be performed. But where the policy of the ſtate intervenes and prevents the performance of the contract, the party will be excuſed; and ſo if a party who has covenanted not to do ſomething is directed by act of parliament to do that very thing, he is releaſed from his covenant; *Brewſter* v. *Kitchin*, 1 *Ld. Raym.* 321. where Lord *Holt* ſays, "the difference where an act of parliament will amount to a repeal of a covenant and where not, is this; where a man covenants not to do a thing which it was lawful for him to do, and an act of parliament comes after and compels him to do it, there the act repeals the covenant, and *vice verſâ*, *Dyer*, 27. *pl.* 178. 186, 7, 8.; but where a man covenants not to do a thing which was unlawful at the time of the covenant, and afterwards an act makes it lawful, the act does not repeal the covenant, *Dyer*, 48. *pl.* 5." The point now in diſpute is reported by Mr. *Park* to have ariſen in *Biſchoff* v. *Agar* (*a*), but caſe went off upon another ground, and no opinion was given upon the queſtion, Whether an embargo be a riſk within the policy or not? My Brother *Marſhall*, in his treatiſe, p. 437. ſays, "if a *Britiſh* ſhip be arreſted or ſeized by the authority of the *Britiſh* Government from ſtate neceſſity, this ſhall be a detention within the meaning of the policy for which the inſurer is liable." When we find an opinion in a text writer upon any particular point, we muſt conſider it not merely as the private opinion of the author, but as the ſuppoſed reſult of the authorities to which he refers. The authorities there cited are *Emerigon*, vol. 1. p. 541. and *Valin*, vol. 2. p. 134. It does not appear to me that thoſe two authors warrant the opinion adopted, at leaſt to the extent to which it is adopted; but that it is rather deduced from an opinion thrown out by Lord *Holt* in *Green* v. *Young*, 2 *Ld. Raym.* 840. where it being a queſtion whether an embargo laid on by the *Britiſh* Government would excuſe the inſurers, Lord *Holt* "ſeemed to incline

(*a*) *p.* 81. 6 edit.

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that it would not, and that this was within detention of princes, &c.;" but he gave no abſolute opinion, becauſe the caſe was referred. That, however, appears to have been a queſtion ariſing between two *Britiſh* ſubjects, with reſpect to which I deſire to be underſtood as giving no opinion. Perhaps there may be no great reaſon why one *Britiſh* ſubject ſhould not inſure another againſt the effects of an embargo laid on by the *Britiſh* Government; the policy of the ſtate is not concerned in preventing ſuch an inſurance. But the caſe is very different where the embargo is laid on by way of hoſtility and repriſal againſt foreign ſubjects. All the caſes admit that where a party has been diſabled from performing his contract by his own default, it is not competent to him to allege the circumſtances by which he was prevented as an excuſe for his omiſſion. May not the loſs which the preſent Plaintiff has ſuſtained be conſidered in a political point of view, as ariſing from his own default? He undertook to proceed with all convenient ſpeed, and if he had loitered it would have been an anſwer to this action. Then muſt not every ſubject of the *Swediſh* ſtate be anſwerable for what we muſt conſider as an act of aggreſſion on the part of his ſovereign? Perhaps if the embargo had been laid on by a third ſtate, it might only have produced a ſuſpenſion of the contract, upon the principle that the impoſſibility of proceeding had not ariſen from the default of the *Swediſh* captain. But here the impoſſibility has ariſen from an act of the *Britiſh* ſtate, to which all his Majeſty's ſubjects are parties, occaſioned by an act of the *Swediſh* court, to which all the ſubjects of *Sweden* are parties.

Per Curiam, Judgment of Nonſuit.

Nov. 29th.

FRONTINE *v.* FROST.

A ſeaman who quits his ſhip after her arrival in port, but before ſhe is moored, does not thereby ſubject himſelf to the forfeiture of his whole wages under the 1 Geo. 2. c. 36. ſ. 3. To enable the maſter to deduct a month's wages for the benefit of *Greenwich* Hoſpital under the 2 G. 2. c. 36. ſ. 8 & 9. it is incumbent on him to ſhew that the ſeamen quitted the ſhip without leave in writing. And ſuch a deduction cannot be ſet off by the maſter in an action for wages by the ſeaman, unleſs the maſter has previouſly debited himſelf to *Greenwich* Hoſpital for the amount in a book kept according to the direction of the ſtatute.

INDEBITATUS aſſumpſit for ſeaman's wages. The Defendant pleaded the general iſſue, and gave a notice of ſet-off.

The cauſe was tried before Lord *Alvanley* Ch. J. at the *Guildhall* ſittings in this term, when it appeared that the Plaintiff was a car-

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penter, and entered into articles at *Martinique*, to ſerve on board the ſhip *Progreſs*, of which the Defendant was maſter, on her homeward voyage; that on the arrival of the ſhip in the port where ſhe was to have been moored, but before ſhe was actually moored, the Plaintiff, together with moſt of the other ſeamen, the ſhip being under the command of the mate, went on ſhore and never afterwards returned; but to ſhew whether he had or had not obtained permiſſion to quit the ſhip, either in writing or otherwiſe, no evidence was offered. On the part of the Defendant it was contended that the Plaintiff, by deſerting from the ſhip before ſhe was actually moored, had forfeited his whole wages, under 2 *Geo.* 2. *c.* 36. *ſ.* 3., or at leaſt that he had forfeited a month's wages to *Greenwich* hoſpital, by abſenting himſelf without leave in writing, which ſum the Defendant was entitled to ſet-off, he being obliged to debit himſelf to *Greenwich* hoſpital for the amount, under the 2 *Geo.* 2. *c.* 36. *ſ.* 6. & 9. The jury, under his lordſhip's direction, found a verdict for the Plaintiff, ſubject to the opinion of the Court upon both points.

Accordingly a rule *nſi* having been obtained on a former day for ſetting aſide or reducing this verdict,

Cockell Serjt. now ſhewed cauſe; firſt, as the Plaintiff quitted the ſhip in company with the reſt of the ſeamen, and no objection appears to have been made to his ſo doing, it is not to be preſumed that he quitted her without leave; and indeed the jury, by their verdict, have negatived the fact of deſertion. If he abſented himſelf without leave in the pool, ſtill that will not amount to a deſertion, by which his whole wages will be forfeited, ſuch forfeiture being only incurred under 2 *Geo.* 2. *c.* 36. *ſ.* 3. by deſertion in parts beyond the ſeas. 2dly, The 2 *Geo.* 2. *c.* 36. *ſ.* 6. directs, that in caſe any ſeaman ſhall leave the ſhip before he has obtained a diſcharge in writing from the maſter or commander or other perſon having charge of the ſhip, he ſhall forfeit one month's pay, to be recovered, applied, and diſpoſed of as thereinafter directed; and the 9th ſection authoriſes the maſter, commander, or owners, to deduct out of any ſeaman's wages all the penalties and forfeitures incurred by the act, and to enter them in a book, which book is to be ſigned by the maſter or commander and two principal officers of the ſhip, ſetting forth that the penalties and forfeitures contained in ſuch book are the whole penalties and forfeitures ſtopped during the voyage, which penalties and forfeitures, except the forfeiture

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for desertion, shall go to *Greenwich* hospital, and be paid and accounted for by the master or commander to the officer who collects the sixpence *per* month. The offence by which the forfeiture of a month's wages is incurred is leaving the ship without a discharge in writing; it was incumbent therefore on the Defendant to shew that he had quitted the ship without such discharge, which might have been done by calling some of the officers of the ship; but at all events before the master could take advantage of this forfeiture he was bound to shew that he had himself complied with all the requisites of the statute, by producing a book containing an entry of the forfeiture, and signed in the manner directed by the statute.

Shepherd and *Vaughan* Serjts. in support of the rule. The articles entered into in pursuance of the statute provide, "that 24 hours absence without leave shall be deemed a total desertion, and render the seamen and mariners liable to the forfeitures and penalties contained in the acts therein recited," which are 2 *Geo.* 2. *c.* 36. and 37 *Geo.* 3. *c.* 73. This must relate to absence during the voyage, which is not at an end until the ship is moored and her cargo delivered. It is supposed, however, that the forfeiture of the whole wages must be confined to desertion in foreign ports; but can it be supposed that if a seaman desert in the *British* channel, or between *Orford Ness* and the *North Foreland*, which is the most dangerous part of the whole navigation, he shall only be subject to the forfeiture of a month's wages? By the articles every seaman agrees to do his duty, and not to go on shore without leave "till the voyage is ended, and the ship discharged of her cargo," and in default thereof to be subject to the penalties of the 2 *Geo.* 2. *c.* 36. and that 24 hours absence without leave shall be deemed a desertion. The Plaintiff therefore having gone on shore without leave before the discharge of the cargo, and never having returned, is by the articles rendered liable to the penalty for desertion contained in the 2 *Geo.* 2. The articles further provide, that no seaman shall be entitled to his wages, or any part thereof, until the arrival of the ship at the port of discharge, and her cargo delivered; which is in the nature of a condition precedent. *Cutter* v. *Powell*, 6 *T. R.* 320. The Defendant having proved that the Plaintiff quitted the ship, it was incumbent on the latter to prove that he had obtained leave, which is a positive fact; for it is contrary to the rule of law to require proof of a negative.

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The jury therefore have found a verdict unſupported by evidence. It cannot be contended that the ſixth ſection of 2 *Geo.* 2. *c.* 36. which ſubjects the ſeaman to the forfeiture of a month's wages for leaving the ſhip without a diſcharge in writing, operates to deſtroy the effect of a forfeiture for deſertion before the ſhip has been moored; ſince the forfeiture created by that ſection is confined, as appears by the preamble, to quitting the ſhip "after her arrival at her unlivering port," and before ſhe is unladen. 2dly, It was not poſſible for the defendant to prove the want of leave in writing; for if a party abſent himſelf clandeſtinely, without firſt demanding permiſſion, no refuſal can be proved. It is ſufficient to ſhew that he was abſent to throw the *onus* on him of proving a diſcharge in writing. If then the Plaintiff abſented himſelf without leave in writing he incurred the penalty impoſed by the act, for which the Defendant is bound to account to *Greenwich* Hoſpital; and it is no anſwer to ſay that the Defendant has neglected to comply with ſome of the regulations of the act, ſince the ſtatute has impoſed a penalty upon him if he does not render an account.

Lord ALVANLEY Ch. J. An attempt has been made to put a new conſtruction on the articles in this caſe, which are in the uſual printed form (*a*). Thoſe articles provide that 24 hours abſence without leave ſhall be deemed a total deſertion, and render every ſeaman liable to the forfeitures and penalties in the 2 *Geo.* 2. *c.* 36. and the 37 *Geo.* 3. *c.* 73. But this clauſe of the articles cannot be ſuppoſed to render ſeamen liable to the penalty impoſed by thoſe acts for deſertion in caſes to which the acts themſelves do not apply. Now it is clear that the intention of the legiſlature in inflicting a forfeiture of the ſeaman's whole wages for deſertion by 2 *Geo.* 2. *c.* 36. *ſ* 3. was confined to the caſe of his refuſing to proceed on the voyage, or quitting the ſhip abroad, by which the maſter might be expoſed to the neceſſity of hiring another perſon to ſupply his place at an exorbitant rate of wages. It is provided by the fifth ſection, that if any ſeaman ſhall abſent himſelf without leave from the commanding officer, he ſhall forfeit two days' pay to the uſe of *Greenwich* Hoſpital. The meaning of theſe two ſections is, that if the ſailor run away before the voyage is commenced, or in ports beyond the ſeas, he ſhall forfeit his whole

(*a*) See the Schedule to 37 *Geo.* 3. *c.* 73.

wages;

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wages; if he abſent himſelf during the voyage and return, he ſhall forfeit two days' pay. It having been found, however, that ſeamen were in the habit of quitting the ſhip after her arrival at the port of delivery, and before the ſhip was unladen, a clauſe was introduced authoriſing the maſter to deduct a month's wages where any ſeaman was guilty of ſuch offence. And, to prevent perſons from ſetting up a pretended permiſſion, it was provided that the permiſſion ſhould be in writing. But if the maſter make this deduction, he ſhould immediately make an entry to that effect in a book to be kept for that purpoſe; which book muſt be ſigned by himſelf and two principal officers of the ſhip. Unleſs this be complied with, I do not ſee how the maſter is to avail himſelf of the deduction by way of ſet-off in an action for the wages. The next queſtion is, Whether the caſe were properly left to the jury upon the evidence? In caſes of forfeiture, the beſt evidence of which the nature of the caſe admits ought to be given by the party who inſiſts upon the forfeiture. It is ſaid, however, that a negative cannot be proved; but there are many caſes in which it may, and in this caſe it might have been ſhewn that the mate, who at the time had the command of the ſhip, had not given a diſcharge. It appeared indeed that the Defendant went away at the ſame time with moſt of the other ſeamen at a period when he might or might not be wanted, and when the ſeamen commonly have leave to go on ſhore. I think, therefore, that there was a fair ground for the jury to infer that the abſence was not without permiſſion.

ROOKE J. (*a*) I am of opinion that the caſe was properly left to the jury. The Plaintiff proved ſervice on board the ſhip up to the time of her arrival at the place where ſhe was to be moored; the Defendant inſiſts upon a forfeiture of the wages, upon the ground of the Plaintiff having deſerted the ſhip; but where a party claims under a forfeiture he is bound to make out his caſe preciſely. It will be extremely hard upon ſeamen under ſimilar circumſtances with the preſent Plaintiff, if they are expected to prove an abſence with permiſſion in order to anſwer a forfeiture which they have no previous notice that the maſter means to ſet up againſt their demand. The next queſtion is, Whether the Defendant was entitled to deduct a month's pay on account of the Plaintiff having left the ſhip at the port of delivery without a diſ-

(*a*) Mr. Juſtice *Heath* was abſent.

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charge? To entitle him to make this deduction, he was bound to keep a book and to make an entry of the intended deduction, and to procure the ſignature of the two chief officers on board; had he done ſo, there would have been ſtrong evidence of the Plaintiff having quitted the ſhip without leave. If the Defendant be under the circumſtances of this caſe liable to *Greenwich* Hoſpital for the deduction, he muſt take the conſequences of his own neglect.

CHAMBRE J. If the jury have found properly that the Plaintiff never deſerted without leave, that finding diſpoſes of the whole caſe. It is inſiſted that it is incumbent on the Plaintiff to prove that he had leave in writing; but the Defendant, who claims a forfeiture, muſt ſhew that the forfeiture has really been incurred; and as abſence with leave will not ſubject the ſeaman to the forfeiture, the Defendant muſt give ſome evidence to prove that the abſence was of that kind which entitles him to make the defence to which he now reſorts. Indeed there are other caſes where a negative muſt be proved (*a*), as in convictions on the game laws, for deſtroying game not being duly qualified, where ſlight evidence of the want of qualification is required (*b*). Had the maſter been the only perſon capable of proving the negative in this caſe, inferior evidence might have been ſufficient to repel the preſumption in the Plaintiff's favour; but it appears that the mate had the charge of the ſhip at the time when the Plaintiff left it, and he might have been called to negative the Plaintiff's having been abſent with leave. Under theſe circumſtances I think the jury were well warranted in preſuming that he had leave. An attempt has been made to put a falſe conſtruction on the act of parliament and the articles. For the purpoſes of a general forfeiture, the voyage muſt be conſidered at an end when the ſhip arrives at the port of delivery. If there be any ambiguity in the 3d ſection of the act, which inflicts a forfeiture of the whole wages for deſertion, it is explained by the language of

(*a*) Where the negative charged conſiſts of a criminal neglect of duty, the law preſumes the affirmative, and throws the proof of the negative on the party who makes the charge. *Williams* v. *The Eaſt India Company*, 2 *Eaſt*. 192.

(*b*) See *Rex* v. *Jarvis* and the other caſes cited in *Rex* v *Stone*, 1 *E. B.* 639. In *Rex* v. *Stone*, indeed, the Judges of the Court of King's Bench were equally divided upon this very point. It ſeems, however, in that caſe to have been admitted, that negative proof is not required in actions upon the game laws for penalties: but that in ſuch actions the Defendant may be preſumed to be *not duly qualified*, and therefore to have offended againſt the ſtatute law of the land, unleſs he proves the contrary by ſhewing his qualification.

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the 6th ſection, which authoriſes the maſter to deduct two months' wages from any ſailor who ſhall quit the ſhip without a diſcharge in writing after her arrival at the port of delivery. We cannot put a reaſonable conſtruction on this act without ſuppoſing it to have different views in theſe two clauſes. It is argued that becauſe the ſailors agree by the articles to do their duty and not to go on ſhore "till the voyage is ended and the ſhip diſcharged of her cargo," without leave of the maſter, and in default thereof to be liable to the penalties of the act, the Plaintiff is liable to the penalty of deſertion for having quitted the ſhip before the cargo was unladen. But the articles ſeem to conſider the end of the voyage and the diſcharge of the cargo as diſtinct things; and if the voyage was at an end upon the arrival of the ſhip at the port of delivery, this defence cannot be ſuſtained. With reſpect to the latter part of the articles, which is ſuppoſed to make the arrival of the ſhip at the port of diſcharge and the delivery of the cargo a condition precedent, there is nothing to warrant that conſtruction; and we are not called upon to ſtrain a point in favour of this defence.

Rule diſcharged.

Nov. 20th

HURRY and Others, *v.* The ROYAL EXCHANGE ASSURANCE COMPANY.

A partial loſs on a policy on goods by reaſon of ſea-damage, is to be calculated by aſcertaining the difference between the reſpective groſs proceeds of the ſame goods when ſound and when damaged, and not the net proceeds.

THIS was an action on two policies of inſurance upon hemp, the one for 4500*l.* to return 2*l per cent* for ſailing with convoy and arriving, and the other for 1400*l.* to return 3*l per cent.* for ſailing with convoy and arriving.

At the trial before Lord *Eldon* Ch. J., at the ſittings after *Hilary* term 1801, a verdict was found for the Plaintiffs, ſubject to the opinion of the Court as to the amount of the damages on the following caſe.

The ſhip ſailed with convoy and arrived, upon which the Plaintiffs are entitled to 132*l.* for a return of premium; but in the courſe of the voyage the hemp was damaged by one of the perils inſured againſt. The invoice price of the hemp, including the premiums of inſurance, and all inſurable intereſt at the time, was 5,997*l.* 2*s.* *d.* Had it not met with damage, the groſs produce would have been 7,799*l.* 11*s.* 1*d.*; but being damaged, the groſs produce was only 5,999*l.* 14*s.* 4*d.*, making a difference of 1799*l.* 16*s.* 9*d.* The

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net ice, after deducting the charges for freight, duties, and other expences, would have been 5,809*l.* 1*s.* 11*d.*; but in conſequence of the damage, the groſs produce was only 5,999*l.* 14*s.* 4*d.* and the net produce only 3942*l.* 3*s.* 11*d.* The inſurance was only upon 5,900*l.* The Plaintiffs contend that the average loſs ought to be computed in one of the three following ways; 1ſt, according to the difference between what would have been the net produce had there been no damage, and the actual net produce (which is 1866*l.* 18*s.*, being 32*l.* 2*s.* 9*d.* *per cent.*) 2dly, By a *per* centage on the invoice price upon the loſs of 1866*l.* 18*s.*; or 3dly, By a *per* centage on the ſum inſured upon the loſs of 1866*l.* 18*s.* The Defendants on the other hand contend, that the loſs ought to be computed by charging upon the invoice price ſuch a proportion of the difference between the ſound and damaged prices at the port of delivery as the invoice value bears to ſuch ſound price, *viz* That as the ſound price of 7799*l.* 11*s.* 1*d* had ſuſtained a loſs of 1,799*l.* 16*s.* 9*d*, the invoice price of 5997*l.* 2*s.* 1*d.* will ſuſtain a loſs of 1,384*l.* 10*s.* If the Court ſhall be of opinion that the Plaintiffs are entitled to the difference between what would have been the net produce had there been no damage, and the actual net produce, the verdict (after deducting freight, duties, and charges) is to be entered for 2,028*l.* 2*s.*, that is to ſay, for 1,896*l.* 2*s.* (being 32*l.* 2*s.* 9*d.* *per cent.* on the ſum inſured) in addition to the 132*l.* for return of premiums for ſailing with convoy and arriving; but if according to the principle contended for by the Defendants, then for 1,516*l.* 10*s.*, that is to ſay, for 1,384*l.* 10*s.* and the 132*l.*

This caſe was argued in *Eaſter* term laſt by *Bayley* Serjt. for the Plaintiffs, and *Beſt* Serjeant for the Defendants, after which it ſtood over till this day for the conſideration of the Court.

And now Lord ALVANLEY Ch. J. ſaid—My Brothers and myſelf are of opinion that the rule laid down in the late caſe of *Johnſon* v. *Sheddon*, 2 *Eaſt.* 581. is the proper rule, and that the loſs muſt in this, as in the caſe alluded to, be calculated upon the groſs proceeds of the goods inſured. If I were to enter into the reaſons upon which our judgment is formed, I ſhould only repeat the arguments which have been already ſtated by Mr. Juſtice *Lawrence*, and in vain comment upon a ſubject which cannot be better illuſtrated than it has been by him.

Per Curiam, Verdict to be entered for 1,516*l.* 10*s.*

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REGULA GENERALIS.

IT IS ORDERED, That from and after the laſt day of this term, no judgment be ſigned upon any warrant authoriſing any attorney to confeſs judgment without ſuch warrant being delivered to and filed by the clerk of the docquets, who is hereby ordered to file the ſame in the order in which they ſhall be received.

AND IT IS FURTHER ORDERED, That every attorney of this Court who ſhall prepare any warrant of attorney to confeſs any judgment which is to be ſubject to any defeazance, do cauſe ſuch defeazance to be written on the ſame paper or parchment on which the warrant of attorney ſhall be written, or cauſe a memorandum in writing to be made on ſuch warrant, containing the ſubſtance and effect of ſuch defeazance.

ALVANLEY,
J. HEATH.
G. ROOKE.
A. CHAMBRE.

END OF MICHAELMAS TERM.

CASES

ARGUED and DETERMINED

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

IN

Hilary Term,

In the Forty-third Year of the Reign of GEORGE III.

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THE priſoner was tried at the *Old Bailey September* Seſſion 1800, before *Chambre* J. upon an indictment founded on the 7 *Geo.* 3. *c.* 50 *ſ.* 1. (*a*), for that he, "at the time of the committing

It ſeems that it is not a felony within the 7 *Geo* 3. *c.* 50 *ſ.* 1 for a perſon employed in the poſt-office to ſteal out of a letter entruſted to his care, a draft on a *London* banker, purporting to be drawn in *London*, but actually drawn above 10 miles from *London*, on unſtamped paper. It ſeems alſo that ſ. 2 of the ſame act does not apply to perſons employed in the poſt-office; and that a perſon of that deſcription therefore, who ſteals a letter out of the poſt-office, is not guilty of felony under that ſection.

(*a*) That ſection provides that if any deputy, clerk, agent, letter-carrier, poſt-boy, or rider, or any other officer or perſon whatſoever, employed in receiving, ſtamping, &c. letters or packets, or in any other buſineſs relating to the poſt-office, ſhall ſecrete, embezzle, or deſtroy any letter, packet, bag, or mail of letters, which he ſhall be entruſted with, or which ſhall have come to his hands or poſſeſſion, containing any bank-note, bank poſt bill, bill of exchange, &c. banker's letter of credit or note for or relating to the payment of money or other bond or warrant, draft, bill, or promiſſory note whatſoever, for the payment of money, or ſhall ſteal or take out of any letter or packet which ſhall come to his poſſeſſion, any bank-note, &c. (as before), he ſhall be guilty of felony without benefit of clergy.

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of the ſeveral felonies and offences thereinafter mentioned, was perſon employed in certain buſineſs relating to the poſt-office; that is to ſay, in ſorting letters and packets brought and conveyed by the poſt to the General Poſt-office, ſituate in *London* aforeſaid, to wit, at, &c.; and that on, &c. a certain letter then lately before brought and conveyed by the poſt, to wit, by the poſt from *Maidſtone* in the county of *Kent* to the General Poſt-office, for and to be delivered to a certain perſon at *Mile End* near *London*, that is to ſay, one *Archibald Thomſon*, and then containing therein a certain draft for the payment of money, bearing date at, &c. (ſtating the draft) whereby the laſt mentioned perſons (the drawers) were required to pay to Mr. *Archibald Thomſon* or bearer 200*l.*, and alſo a certain other draft for the payment of money, to wit, of the ſum of 200*l*, came to the hands and poſſeſſion of the ſaid *B. Pooley*, then and there being ſuch perſon ſo employed as aforeſaid in the buſineſs of his ſaid employment; and that he afterwards, to wit, on, &c. at, &c. being then and there ſuch perſon ſo employed as aforeſaid, and then and there having the ſaid letters containing the ſaid drafts in the hands and poſſeſſion of him the ſaid *B. Pooley* as ſuch perſon ſo employed as aforeſaid, feloniouſly did ſecrete the ſaid letter, then containing the ſaid drafts (the ſaid drafts then and there being in force, and being the property of *D. T.* (the drawer), and the ſums of money made payable and ſecured thereby reſpectively then and there being unſatisfied,) *contrà formam ſtatuti*," &c. The 2d count deſcribed it as being "a packet." The 3d and 4th counts were the ſame as the 1ſt and 2d, only laying it to be the property of *Archibald Thomſon* the payee. There were alſo four other counts, varied like the two firſt, charging him with "ſtealing and taking from and out of the ſaid letter the ſaid drafts."

The draft was directed to the *Stratford Place* Banking-houſe in *Marybone*, and was dated at *London*; but at the trial it was proved to have been drawn at *Teſton* near *Maidſtone* in *Kent*, above ten miles from the Banking-houſe. And thereupon an objection was taken by the priſoner's counſel, that as the draft contained in the letter was drawn upon unſtamped paper (*a*), it was not a valid order for payment of money, and therefore not within the ſtatute.

(*a*) See 31 *Geo.* 3. *c.* 25. *ſ.* 4. which confines the exception in favour of bankers' drafts to ſuch as are drawn upon any banker reſiding within ten miles of the place where the draft is drawn.

This point having been reſerved for the opinion of the twelve Judges, was argued before them on the 21ſt of *November* 1800 in the Exchequer-chamber.

Knowlys for the priſoner. The objections in this caſe are two; 1ſt, That the draft in queſtion is not a draft within the meaning of the 7 *Geo.* 3. *c.* 50. 2dly, That this indictment is not proved. A draft for the payment of money within the meaning of the ſtatute muſt be ſuch a draft that the perſon in whoſe favour it is drawn may compel the payment of the money mentioned therein by action; whereas the draft in this caſe was altogether ineffectual at law. In *R.* v. *Moſſatt*, 2 *Leach*, *C. C.* 483. it was decided that forgery could not be committed of a bill of exchange drawn for a leſs ſum and in a different form than that required by 17 *Geo.* 3. *c.* 30.; and in *Mary Mitchell*'s caſe, *Foſt.* 119. the priſoner having forged an order to a tradeſman for delivery of goods in the name of an overſeer of a pariſh *requeſting* him to let the priſoner have the goods and he would ſee them paid for, the Judges held it not within 7 *Geo.* 2. *c.* 22., which makes it felony to forge any warrant or order for delivery of goods, the terms uſed not being ſtrong enough to amount to a warrant or order. That determination has ſince been expreſsly recognized in *R.* v. *Williams*, 1 *Leach C. C.* 134. So in *R.* v. *Clinch*, 2 *Leach C. C.* 611. it was decided that the order muſt be directed to the perſon who is in poſſeſſion of the goods, and muſt import that the perſon whoſe name is charged to be forged had authority to make it. The ſame doctrine was laid down in *R.* v. *Ellor*, 1 *Leach C. C.* 363., with reſpect to the forgery of orders for the payment of money under 7 *Geo.* 2. *viz.* that the terms of the order muſt be poſitive. In all theſe caſes the Judges have conſtrued the act by which a new felony was created in the ſtricteſt manner, not regarding whether the caſes were within the miſchief guarded againſt by the legiſlature, if not within the true conſtruction of the letter of the act. Now by the 7 *Geo.* 3. *c.* 50. a new felony was created, and the words uſed as applicable to this indictment are "draft for the payment of money." It was on account of the value of theſe inſtruments, and their negotiability, that the legiſlature conſidered the offence in ſo ſerious a light, and puniſhed it with death. But the 31 *Geo.* 3. *c.* 25 having impoſed a particular ſtamp upon them, and declared them not to be available either in law or equity without that ſtamp, the draft taken out of the letter by the priſoner had

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had neither value nor negotiability; and though it imports to be payable on demand, yet the holder could not have compelled that payment. In the next place, the indictment has alleged that the draft in queſtion was *in force* at the time it was taken; whereas, from the want of a ſtamp, it never was, from the time of its creation to that of its being taken by the priſoner, in any way available.

Abbott on the part of the crown. It is not neceſſary to ſupport with proof the allegation that the draft was *in force*, but it may be rejected as ſurpluſage. In *Peppin* v. *Solomons*, 5 *T. R.* 498. the rule is laid down by *Buller* J. as to proving allegations when made, and confined by him to deſcriptions of contracts and records. Indeed in *R.* v. *Jenks*, 2 *Leach C. C.* 896. where the priſoner was indicted for a burglary in the houſe of *A.* with intent to ſteal the goods of *B.*, though no ſuch perſon as *B.* lived in the houſe, or had any property there, the latter allegation was held immaterial. With reſpect to the 1ſt objection, though the draft in queſtion could not have been received in evidence for the purpoſe of compelling payment of it, yet it may be received in evidence to convict the priſoner of the offence with which he is charged. In *R.* v. *Hawkeſwood*, 1 *Leach C. C.* 292. it was held that a bill of exchange not ſtamped might be received in evidence to ſupport an indictment for forgery; and in *R.* v. *Colin Reculiſt*, 2 *Leach C. C.* 811. an unſtamped promiſſory note was received in evidence to convict the priſoner of uttering the ſame. In that caſe *Groſe* J. in delivering the opinion of the Judges, ſays, "the propoſition ariſing from the objection is, that the paper writing ſtated in the indictment is not a promiſſory note, becauſe it is not on a ſtamp; but the queſtion, whether it is or is not a promiſſory note, depends upon the tenor of the inſtrument, and not upon the circumſtance of its being ſtamped or not." The determination in *R.* v. *Moffat* proceeded on the words of the 17 *Geo.* 3. *c.* 30. which had declared ſuch a bill of exchange as was forged in that caſe *void*. But the 31 *Geo.* 3. *c.* 25. does not declare the inſtruments there enumerated void if not ſtamped, but that they ſhall not "be pleaded or given in evidence in any court, or admitted in any court to be uſeful or available in law or equity as an acknowledgment of any debt," *&c. &c.* The draft in this caſe could not have been enforced, being unſtamped, but it did not appear upon the face of it to require a ſtamp, ſince it did not purport to be drawn above ten

miles from *London*. The object of the legiſlature was to prevent the property of perſons conveyed by the poſt from being ſtolen. [Lord *Eldon* C. J. The legiſlature has not made it a felony to ſecrete any letter, but to ſecrete any letter containing ſuch valuables as are there enumerated.]

The opinion of the Judges was never publicly communicated, but a pardon was granted to the priſoner for the ſpecific offence charged upon him by the indictment, in order that he might be indicted upon the 2d ſection of the ſtatute 7 *Geo.* 3. *c.* 50.

Accordingly the priſoner was again tried at the *Old Bailey* Seſſions in *February* 1801, by *Lawrence* J., on an indictment framed on the 2d ſection (*a*) of the 7 *Geo.* 3. *c.* 50. for that he "feloniouſly did ſteal and take from and out of a certain poſt-office, to wit, the chief Penny-poſt Office ſituate, ſtanding, and being in, *&c.* one letter, theretofore ſent by the poſt to the ſaid poſt-office for and to be delivered to a certain perſon at *Mile End* near *London*, that is to ſay, one *Archibald Thomſon*, and one other letter, *contrà formam ſtatuti*," *&c.* The 2d count was for ſtealing "out of a certain houſe for the receipt and delivery of letters ſent by the poſt, ſituate," *&c.* and the 3d, "out of a certain place for the receipt," *&c.* There were three other counts, only varying from the firſt by charging him with ſtealing "one packet theretofore ſent by the poſt."

It appeared in evidence that the priſoner was employed in the penny-poſt department as a charge-taker and as a letter-carrier, and that as charge-taker the letters arriving by the General Poſt, which were to be delivered by the carriers of the Penny-poſt of the eaſtern diviſion, were delivered to him to be divided according to the different walks of the letter-carriers, and that he did not deliver the letter the ſubject of the indictment to the letter-carrier within whoſe walk the perſon lived to whom it was directed; that he afterwards opened it, and took out of it a check or draft for

(*a*) That ſection provides, "that if any perſon whatſoever ſhall rob any mail of any letter or packet, bag, or mail of letters, or ſhall ſteal and take from or out of any ſuch mail, or from or out of any bag of letters ſent or conveyed by the poſt, or from or out of any poſt-office or houſe or place for the receipt or delivery of letters or packets ſent or to be ſent by the poſt, any letter or packet, he ſhall be guilty of felony without benefit of clergy, although ſuch robbery, ſtealing, or taking ſhall not appear to be taking from the perſon, or on the high-way, or in any dwelling-houſe, *&c.* and although it ſhould not appear that any perſon was put in fear."

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200 *l.* on the *Stratford Place* Bank, drawn on unſtamped paper by a perſon living above 30 miles from *Stratford Place*.

It was objected for the priſoner that this draft being on unſtamped paper could not be received in evidence as a medium to ſhew that the priſoner had ſtolen the letter. But the Court overruled the objection, being of opinion that the draft, though unſtamped, might be received in evidence for collateral purpoſes, though not for the purpoſe of recovering the money contained in it. But the Court entertained doubts whether the 2d ſection of the 7 *Geo.* 3. *c.* 50. applied to ſervants of the poſt-office, againſt whoſe miſconduct the firſt ſection of that act was intended to guard, and from which it may be inferred that the legiſlature did not conceive that the embezzling a letter by theſe ſervants was a larceny.

The caſe was argued before the Judges (*abſente* Lord *Eldon* C. J.) on *Saturday* the 2d of *May* 1801.

Knapp for the priſoner. This indictment is framed on the 2d ſection of the 7 *Geo.* 3. *c.* 50., and it will be neceſſary for me to contend that this ſection does not extend to the priſoner, becauſe he was a perſon employed in the poſt-office as a charge-taker and letter-carrier. In the conſtruction of penal ſtatutes all the clauſes in the ſame ſtatute, and all the ſtatutes *in pari materiâ* muſt be taken together. In the 5 *Geo.* 3. *c.* 25. *ſ.* 17. 19. & 20. proviſions ſimilar to thoſe contained in the two firſt ſections of the 7 *Geo.* 3. *c.* 50. are confined to perſons employed in the poſt-office: and the third ſection of the 7 *Geo.* 3. again takes notice of perſons employed in the poſt-office, and provides againſt their deſtroying any letter for which they have received the poſtage. The words, therefore, "any perſon or perſons whatſoever," contained in the 2d ſection of the 7 *Geo.* 3., can only be conſtrued to extend to perſons not employed in the poſt-office. In *Rex* v. *Skutt*, *Leach's Crown Caſ.* 124. ed. 3., it was doubted whether an embezzlement by a ſervant would amount to larceny; and indeed the 39 *Geo.* 3. *c.* 85., which was made to protect maſters againſt embezzlements by their clerks or ſervants, was paſſed on a doubt ſuppoſed to be entertained by the Judges in *Rex* v. *Bazeley*, *Leach's Crown Caſ.* 973. ed. 3. whether the priſoner, being employed as a ſervant, was guilty of a larceny in embezzling money delivered to him for his maſter. Now in this caſe the priſoner had a poſſeſſion by delivery to him as a ſervant, and he is

not charged with embezzling but with ſtealing. [*Heath* J. There never was any doubt amongſt the Judges in *Baſeley*'s caſe whether a ſervant, as ſuch, might not be guilty of larceny; but the difficulty there, and upon which the deciſion proceeded, was, that the money being paid to the ſervant for the maſter, was taken by the former before it ever came to the poſſeſſion of the latter by being put into the till.] In *Rex* v. *Waite*, *Leach's Crown Caſ.* 33. ed. 3. it was determined not to be felony in a caſhier of the Bank to embezzle an *India* bond. The report of *Skutt*'s caſe is very inaccurate: for it appears upon inquiry that the words "being a perſon employed in the General Poſt-office" were not inſerted in the indictment, as ſtated in the report; but that the indictment was general, "for that he did ſteal and take from the General Poſt-office one letter, *&c.* againſt the form of the ſtatute:" and in ſome of the counts of the indictment there was an averment that the ſaid letter was of the value of 5*s.* 3*d.* That caſe, therefore, is preciſely ſimilar to the preſent; ſince the indictment was founded on the 2d ſection of the 7 *Geo.* 3. *c.* 50.: and it appearing in evidence that the priſoner, at the time when the offence was committed, was a ſorter of letters in the poſt-office, it was objected that the caſe was not within the act, to which the Court aſſented. In this caſe indeed, the letter not having been alleged to be of any value or the property of any perſon, the offence charged does not amount to ſtealing: for according to the doctrine of *The King* v. *Phipoe*, 2 *Leach*, 774. the priſoner could not be convicted of larceny for ſtealing a mere piece of paper, as the letter in the preſent caſe is. [*Lawrence* J. obſerved, that in Mrs. *Phipoe*'s caſe the Judges only decided that the compelling a man by threats to draw a promiſſory note was not a felony.]

Abbott on the part of the Crown. The obſervation on the form of the indictment ariſes from that uſed in *R.* v. *Skutt:* but it is to be obſerved that the apparent reaſon why value was charged in that indictment was, that the letter did actually contain 5*s.* 3*d.* Of late years it has been the uniform practice in proſecutions of this kind to omit any allegation either of value or property: and indeed a letter as ſuch can be of no value. The ſubſtantial objection depends upon the true conſtruction of the ſtatute. The 1ſt ſection of the 7 *Geo.* 3. *c.* 50. provides for certain ſpecific offences committed by perſons of a particular deſcription, *viz.* the officers

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of the poſt-office; and that without any regard to the place at which the offence is committed. Then the 2d ſection provides for another claſs of offences committed not by any particular deſcription of perſons, but by any perſon or perſons whatſoever. If the argument which has been uſed in favour of the priſoner be ſucceſsful, that the words "any perſons whatſoever" are to be ſo reſtrained as to exclude the particular perſons deſcribed in the 1ſt ſection of the act, it will follow that an officer of the poſt-office robbing the mail upon the highway could not be convicted under this 2d ſection, which provides for that offence. But it has been contended, that the taking a letter by a perſon entruſted with the poſſeſſion of it, is not a ſtealing by reaſon of the truſt. Now it is true, that in common caſes a bailee would not be guilty of larceny. But the perſons employed in the poſt-office are not the ſervants of the individuals to whom the letters belong, but the ſervants of the Crown. This appears from the caſe of *Whitfield* v. *Lord le Deſpenſer*, *Cowp.* 754. where it was held that the Poſtmaſter General was not liable as a common carrier, being the ſervant of the public. The caſe of *Rex* v. *Waite* therefore is not applicable to the preſent, the priſoner there having been the ſervant of a private corporation in which the property of the bond was veſted. Beſides, the truſt repoſed in the priſoner in this caſe did not extend to taking the letter out of the office, it having been his buſineſs to deliver it in the office to the perſon to whoſe walk it belonged. His poſſeſſion of the letter was ſpecial and qualified, and reſembled the poſſeſſion which a butler has in the plate or a ſhepherd in the ſheep of his maſter, who are guilty of larceny if they take the property entruſted to them; 1 *H. P. C.* 505.; or that of a confidential clerk, who takes a bill of exchange from the counting-houſe of his maſter and receives the money. *Rex* v. *Chipchace*, 2 *Leach*, *Crown Caſ.* 805. ed. 3. It is clear that the offence committed in this caſe is within the meaning of the 7 *Geo.* 3. *c.* 50. *ſ.* 2.; and indeed if it be not, this conſequence will follow, that the perſons who have the greateſt opportunity of committing the crime which the legiſlature meant to prevent, will not be ſubject to any puniſhment for ſo doing, ſince very few perſons but thoſe employed in the poſt-office have any opportunity of ſtealing any letter out of it. With reſpect to *Skutt*'s caſe, the point does not ſeem to have been fairly before the judges; for, according to the report, the caſe was treated as ariſing

upon the 1ſt ſection of the ſtatute; whereas it appears from the indictment to have been founded on the 2d. 1803.

The opinion of the Judges was never publicly communicated; but the priſoner was detained in cuſtody until the 10th *July* laſt, when he was pardoned and diſcharged. The KING v. POOLEY.

DECKER *v.* THOMSON.

Jan. 26th.

If after the time for pleading is out, but before judgment ſigned by the Defendant, the Court on his application ſtay proceedings till the Plaintiff give ſecurity for coſts, to be approved by the prothonotary, the Plaintiff, though he give ſecurity *inſtanter*, which is accepted by the Defendant, is not at liberty to ſign judgment before the opening of the office on the next morning.

THIS was a rule calling on the Plaintiff to ſhew cauſe why the judgment ſigned ſhould not be ſet aſide for irregularity.

A rule to plead having been given on the 30th of *June*, the time for pleading expired on the 3d of *July*. On the 6th of the ſame month, the Plaintiff not then having ſigned judgment, an application was made to the Court by the Defendant to ſtay proceedings until the Plaintiff ſhould give ſecurity for coſts to be approved by the prothonotary. This application was oppoſed in the firſt inſtance and granted by the Court: but on the ſame day, before any rule was drawn up, the Plaintiff gave ſecurity, which was accepted by the Defendant, immediately after which the Plaintiff ſigned judgment.

Shepherd Serjt. ſhewed cauſe, and contended that as the time for pleading was out before the application to the Court, and the Defendant had waved the prothonotary's approbation by accepting the ſecurity, the Plaintiff was at liberty to ſign judgment as ſoon as he had complied with the order of the Court.

Beſt Serjt. *contrà*.

Lord ALVANLEY Ch. J. The Court having made an order that the Plaintiff ſhould not proceed until he had given ſecurity, it was not competent to him to do the act, and ſign judgment *uno flatu*.

CHAMBRE J. He ought to have waited till the opening of the office on the next morning.

Per Curiam, Rule abſolute (*a*).

(*a*) It has been held that judgment may be ſigned immediately after the delivery of a bill of particulars, if the time for pleading be out. *Hifferman* v. *Langelle*, *ante*, vol. p. 363.

Jan. 27th.

LEEDS and Another *v.* WRIGHT.

A., the general agent in *London* of *B.* and Co. a houſe at *Paris*, with power to export for them to ſuch markets as he ſhould think fit, purchaſed goods in the name of *B.* and Co. of *C.* at *Manchester*, and directed them to be ſent to *D.* a packer in *London*. After their arrival *A.* had ſome of the goods unpacked and ſent away, and the remainder repacked. News then arrived of the failure of *B.* and Co. Held that the goods in *D.*'s hands were no longer *in tranſitu*, and that *C.* therefore had no right to ſtop them.

TROVER for goods. The cauſe was tried before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after laſt term, when it appeared that the goods in queſtion were purchaſed of the Plaintiffs at *Manchester* by one *Moiſſeron* (who was the general agent in *London* of the houſe of *Le Grand* and Co. of *Paris*) in the name of that houſe; that by *Moiſſeron*'s directions the goods were ſent for him to the houſe of the Defendant in *London*, who was a packer, and arrived there on the 3d of *September* 1802; that upon their arrival there *Moiſſeron* came to the Defendant's houſe and had ſome of the goods unpacked and ſent away, and the remainder repacked; that on the 7th of *September*, while the goods ſo repacked remained in the houſe of the Defendant, news arrived that the houſe of *Le Grand* and Co. at *Paris* had failed; upon which the Plaintiffs tendered to the Defendant his charges upon the goods and required that they ſhould be delivered up to them. It alſo appeared that *Moiſſeron* had a general power either to ſend the goods to *Le Grand* and Co. at *Paris*, or to *Holland*, *Germany*, or ſuch other market as he ſhould think moſt beneficial. A verdict was found for the Defendant.

Beſt Serjt. now moved for a new trial, inſiſting that the goods, while in the hands of the Defendant, were ſtill *in tranſitu*, and conſequently that the Plaintiffs were entitled to recover them. He referred to *Hunt* v. *Ward*, cited in *Ellis* v. *Hunt*, 3 *T. R.* 467., where goods ſent by order of the vendee to a packer were held to be *in tranſitu*, the packer being conſidered as a middle man between the vendor and vendee; alſo to *Stokes* v. *La Riviere*, cited in the ſame caſe, p. 466., and *Holſt* v. *Pownal*, 1 *Eſp. N P. Caſ.* p. 240., to ſhew that goods muſt be conſidered *in tranſitu* till they arrive at their ultimate place of deſtination, and to *Hodgſon* v. *Loy*, 7 *T. R.* 440.

Lord ALVANLEY Ch. J. Theſe goods were not ſent to the Defendant to be delivered by him to the houſe of *Le Grand* and Co. at *Paris*, but they were ſent to *Moiſſeron*, the agent of that houſe in *London*, and were there to await his diſpoſal, he being inveſted with authority to ſend them to ſuch market as he ſhould think moſt adviſeable. The goods, therefore, were received by the Defendant,

fendant, not on the account of *Le Grand* and Co., but on that of *Moiſſeron*. The delivery to the Defendant was clearly a delivery to *Moiſſeron*, although the goods were intended for exportation; and indeed his conduct ſhews that they were ſo conſidered, ſince, after their arrival at the Defendant's houſe, he ordered ſome to be unpacked and ſent away, and the remainder to be repacked. None of the caſes cited, therefore, apply to the preſent. Indeed *Moiſſeron* might, if he had ſo pleaſed, have made *London* the place of their ultimate deſtination, and diſpoſed of the goods there.

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HIATH, ROOKE, and CHAMBRE Js. concurring:

Beſt took nothing by his motion.

FULWOOD *v.* ANNIS.

Jan. 28th.

The Court of *C. B.* refuſed to amend a *ſcire facias* againſt bail.

THIS was a rule to ſhew cauſe why the Court ſhould not amend the *teſte* of a writ of *ſcire facias* againſt bail: there were fifteen days between the *teſte* and return, but the former bore date before the writ of *ca ſa*.

Lord ALVANLEY Ch. J. The power of amending writs of *ſcire facias* againſt bail is certainly diſcretionary: but the Court in the exerciſe of their diſcretion do not think proper to cure any irregularities of which the bail are entitled to take advantage (*a*).

Rule diſcharged (*b*).

Vaughan Serjt. for the Plaintiff.

Shepherd Serjt. for the Defendant.

(*a*) In *Perkins* v. *Petit*, *ante*, vol. 2. p 275. the Court intimated that in future amendments of this kind would be allowed, though they did not think proper to allow the amendment prayed in that caſe.

(*b*) In addition to the caſes cited in *Perkins* v. *Petit*, to ſhew that amendments are not to be allowed in caſes of bail, ſee *Grey* v. *Jeffiſon*, 2 *Str.* 1165.

ARBUCKLE and Another, Aſſignees of HENRY POOLE, Clerk, an inſolvent Debtor, *v.* COWTAN.

Feb. 3d.

The profits of an eccleſiaſtical benefice do not paſs to the aſſignees under an inſolvent act, though included in the ſchedule of the inſolvent.

ASSUMPSIT for the uſe and occupation of the vicarage houſe, garden, orchard, and glebe land, and all the vicarial tithes of the vicarage of the pariſh and pariſh church of *Hernhill* in the county of *Kent*.

This cauſe came on to be tried at the *Weſtminſter* Sittings in *Eaſter* term laſt before Lord *Alvanley* Ch. J. purſuant to a decree of

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of the Court of Chancery of the 14th of *July* 1801. A verdict was found for the Plaintiffs, damages 337*l.* 16*s.* 6*d.*, ſubject to the opinion of the Court upon the following caſe:

By articles of agreement in writing, dated the 17th day of *March* 1785, between the Rev. *Henry Poole* clerk, then and ſtill being vicar of the pariſh of *Hernhill* in the county of *Kent* of the one part, and the above named Defendant of the other part, it was agreed that from *Michaelmas* 1784 the ſaid *Henry Poole*, in conſideration of the ſaid Defendant paying him 90*l.* a-year on or before the 10th of *December*, and 30*l.* a-year to the curate, in two payments, viz. on the 9th of *February* and 9th *Auguſt*, and one guinea to the widows of clergymen in *Kent*, and 17*s.* in part of the tenths and the land-tax and parochial rates, ſhould inveſt the ſaid Defendant with every claim he had as vicar of *Hernhill* aforeſaid, on the ſeveral occupiers of lands, wood, fruit, &c. together with the vicarage houſe, garden, orchard, and glebe land, except all ſurplice fees and church-yard dues; but with proviſo that neceſſary repairs to the vicarage houſe, barn, ſtable, and fences of the yard, and garden gates and ſtiles ſhould be at the coſts and charges of the ſaid *Henry Poole*, as well as any land-tax or poor's rates other than what the ſaid vicarage was then charged with; and that the ſaid Defendant ſhould ſuffer one *John Groombridge* the then tenant of the vicarage houſe to continue as long as he paid the yearly rent of 8*l.*; and that the ſaid agreement ſhould continue until either of the parties thereto ſhould give notice to the contrary three months at leaſt before *Michaelmas*, at which time of the year and no other the ſaid agreement ſhould ceaſe and determine. By virtue of this agreement the Defendant on the 17th day of *March* 1785 aforeſaid entered upon the ſaid premiſes in the ſaid agreement mentioned, and hath continued from thence hitherto to hold and enjoy the ſame under and by virtue of the ſaid agreement, and hath duly performed the ſaid agreement in all things therein contained on his part to be done up to *Michaelmas* 1797. On the 3d day of *October* 1797, the ſaid *Henry Poole* being a priſoner in the cuſtody of the warden of his Majeſty's priſon of the *Fleet*, at the ſuit of divers perſons, for debts amounting in the whole to a leſs ſum than 1200*l.*, and being entitled to the benefit of the act of parliament paſſed in the 37th year of his preſent Majeſty's reign, intitled, "An act for the relief of certain inſolvent debtors," he the ſaid *Henry*

Poole was on the ſaid 3d day of *October* 1797, at the General Quarter Seſſions of the peace for the city of *London* duly diſcharged from his ſaid impriſonment by virtue of the ſaid act, and did then and there deliver in a ſchedule of his real and perſonal eſtate according to the directions of the ſaid act, in which ſchedule the ſaid *Henry Poole* did (amongſt other particulars of his eſtate and effects) inſert the following article, *viz.* "The vicarage of *Hernhill* in *Kent*, the tithes of which have been paid to me to *Michaelmas* 1796, which I have applied for the ſupport of myſelf and family." By a deed-poll dated the 10th day of *February* 1798, *William Rix* Eſquire then being clerk of the peace for the city of *London*, did by virtue of the ſaid act aſſign and convey all and ſingular the eſtate and effects of the ſaid *Henry Poole* to the abovenamed Plaintiffs, in truſt, for the benefit of themſelves and the reſt of the creditors of the ſaid *Henry Poole*. On the 11th of *May* 1795 the ſaid *Henry Poole* was directed by the Archbiſhop of *Canterbury* to augment the curate's ſalary from 30*l.* to 85*l* a year, whereupon the ſaid Defendant was requeſted to pay the additional 5*l.*, and to deduct it from the 90*l.* annual rent; ſo that the net rent payable by the ſaid Defendant from *Michaelmas* 1797 was 85*l.* a-year only. The queſtion reſerved for the opinion of the Court was, Whether under the circumſtances above ſtated the Plaintiffs were entitled to recover any, and what ſum of money from the Defendant in this action? If the Court ſhould be of opinion that the Plaintiffs were entitled to recover any ſum of money from the Defendant, a verdict to be entered for the Plaintiffs for that ſum, ſubject to the further directions of the Court of Chancery. If on the contrary the Court ſhould be of opinion that the Plaintiffs were not entitled to recover any thing in this action, then a verdict to be entered for the Defendant, ſubject as aforeſaid.

Marſhall Serjt. for the Plaintiffs. The queſtion for the opinion of the Court is, Whether the profits of the vicarage, which has been aſſigned for the benefit of the inſolvent's creditors, do or do not paſs under that aſſignment? No expreſs decition upon this ſubject is to be found, but the words of the aſſignment being ſufficiently comprehenſive to paſs every ſpecies of property to which the inſolvent was entitled, muſt neceſſarily be held to include this particular property. The revenues of a clergyman have never been deemed a mere ſtipend for the performance of a duty, but conſti-

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tute a freehold; and it is on that account that executions have been allowed against this species of property for the recovery of debts. Sir *Edward Coke* in 2 *Inst.* 472. says, If the sheriff return that the Defendant is *clericus et beneficiatus nullum habens laicum feodum*, the Plaintiff shall have a writ to the bishop to levy *de bonis ecclesiasticis*; who thereupon appoints sequestrators, and sufficient being reserved to serve the cure, the remainder is taken under the execution. It is quite clear that a clergyman may be a bankrupt, and if so, the fruits of his benefice must pass to his assignees. In the case *ex parte Meymot*, 1 *Atk.* 196. where it was contested whether a clergyman could become a bankrupt, Lord *Hardwicke*, in considering the objection, though he does not expressly decide whether a benefice would pass to the assignees, seems to think that it would. He says, "To be sure there are in the bankrupt acts no words that relate merely to ecclesiastical estates, and therefore it is said, if the whole living is seized it may prevent serving the cure. But I do not know that this would be the consequence." His lordship then refers to the special execution at law *de bonis ecclesiasticis*; and adds, "I do not see, but I give no opinion, why the same method may not be followed under a commission of bankruptcy, for it does not appear to me that this would supersede the bishop's authority." If the case of *Flarty* v. *Odlum*, 3 *T. R.* 681. be relied upon, where it was decided that the half pay of an officer could not be assigned under an insolvent act, it may be observed that no two cases can be more different, an officer having no certain interest in his half pay, and not being able to maintain an action for it, whereas a clergyman has a freehold in his living. It is to be recollected also that it has been the constant practice for clergymen to make provision for their families by raising annuities upon their livings, which they could not do, if they had not the power of assigning their interest in their livings: and if a clergyman himself can assign his living, there is no reason why it should not pass under the assignment of the law.

Shepherd Serjt. for the Defendant. Although the fruits of a vicarage are liable to the payment of the debts of the vicar when sequestration is granted by the bishop, yet they do not pass under this sort of statute execution. It is clear that, notwithstanding the general words of the assignment, there are some things which do not pass: such as the half pay of an officer, as was decided in *Flarty* v. *Odlum*.

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The agreement made between the vicar and the Defendant can make no difference in the caſe: for if ſuch a leaſe or agreement were aſſignable the vicar might diveſt himſelf of all the benefit ariſing from his living, conſequently of all power of ſerving the cure, which the law will not allow; for the revenues ariſing from a vicarage are intended for the purpoſe of ſupporting a vicar in the ſervice of the church. By the 13 *Eliz.* c. 10. all leaſes, gifts, grants, conveyances, feoffments, or eſtates, made by ſpiritual perſons for more than the term of 21 years or three lives, whereupon the accuſtomed yearly rent is reſerved, are void. It is true that the title of that act and its proviſions are framed as if made for the protection, not of the ſpiritual perſons themſelves, but of their ſucceſſors. But when we look at the 14 *Eliz.* c. 11. ſ. 15. which, after reciting that evil diſpoſed perſons had defrauded the true meaning of the 13 *Eliz.* by entering into bonds and covenants to ſuffer other perſons to enjoy their livings, which bonds and covenants were not held to be leaſes, it was enacted that all bonds, contracts, promiſes, and covenants for the above purpoſe ſhould only be of ſuch force and validity as leaſes made by the ſame perſons. From this it appears that the object of the legiſlature was to prevent eccleſiaſtical perſons from charging their benefices except by leaſe, reſerving the accuſtomed rent: and it is clear that theſe proviſions muſt have been made with a view to protect eccleſiaſtical perſons againſt their own imprudence, and not merely to protect their ſucceſſors, who could not be charged by the bond or covenant of their predeceſſor. The object was not only to prevent dilapidations, but to ſecure a proper revenue to eccleſiaſtical perſons, with which they might ſupport a becoming hoſpitality. If a vicar be allowed to leaſe, reſerving a rent, and then to aſſign the reverſion, it is the ſame thing as if he were allowed to leaſe without reſerving any rent whatever: conſequently the vicar in this caſe could not himſelf have aſſigned this agreement to his creditors. Can it be contended, then, that under the inſolvent act that will paſs to his creditors which he could not have aſſigned to them? It has always been holden that nothing paſſes under thoſe acts but what the party himſelf could conſiſtently with the nature of his intereſt and with public policy have tranſferred. On this principle proceeded the caſe of *Flarty* v. *Odlum*. Nor will it make any difference that the inſolvent has inſerted this property in his ſchedule; for though he may have thought himſelf

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bound by his oath to inſert it, ſtill if it be that ſort of property which he could not aſſign, it will not paſs. Where the execution againſt a beneſice proceeds not on common proceſs, but on a writ directed to the biſhop, thoſe inconveniencies which the legiſlature has been ſtudious to guard againſt are prevented: for the biſhop in ſequeſtering has a right to deduct a reaſonable ſum for the ſupply of the cure, and likewiſe for the maintenance of the incumbent and his family, if he hath not otherwiſe ſufficient to maintain them. *Burn's Eccl Law*, tit. *Sequeſtration*, vol. 3. p. 318. ed. 2. If it be urged that the inſolvent himſelf has provided by his agreement for ſerving the cure; it may be anſwered, that the ſervice of the cure is only one of the things to be provided for by the biſhop, who is alſo bound to take care both of the incumbent himſelf and of his family. With reſpect to the opinion ſuppoſed to have been expreſſed by Lord *Hardwicke* in *Ex parte Meymot*, it is obſervable that when he ſuggeſts that a ſpiritual preferment may poſſibly be within the ſtatutes of bankrupt, he expreſsly aſſigns as a reaſon that a writ may iſſue to the biſhop, and he may apportion a part to ſerve the cure.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord ALVANLEY C. J. With reſpect to all ſums of money which had become due to the inſolvent at the time when he took the benefit of the inſolvent act, it is admitted that the Plaintiffs are entitled to recover. Unqueſtionably every right and intereſt in poſſeſſion, which had veſted in the inſolvent previous to the paſſing of the 37th of *Geo.* 3 *c.* 112., was by that act immediately tranſferred to the aſſignees; and whatever action might have been brought by the inſolvent, may be maintained by the aſſignees. So long as the Defendant continued in the occupation of the vicarage, he was liable to the payment of the ſtipulated ſum; as far, therefore, as the action extends to the arrears which were due at the time when the inſolvent took the benefit of the act, the claim of the aſſignees may be maintained. Suppoſing a commiſſion of bankrupt to extend to perſons in holy orders, ſtill the queſtion will be, Whether the aſſignees under this inſolvent act have ſucceeded to the rights of the inſolvent in all the revenues of the church of which he was vicar? for it is impoſſible to contend that they are entitled under the agreement, without alſo contending that if there had

been no agreement they would have been in the ſame ſituation as the vicar himſelf, and would have been entitled to demand from the poſſeſſors of the glebe-lands and from the terre-tenants of the pariſh the rent and tithes due to the vicar of *Hornhill*. In ſhort, it muſt be argued, that although the inſolvent act does not expreſsly make the aſſignees vicars, yet that it inveſts them with all the eccleſiaſtical rights of the vicar. It is material to conſider how the common law ſtood with reſpect to the rights with which creditors of perſons in holy orders and beneficed clerks were cloathed. No one is ignorant that at common law land could not be taken into the hands of the creditor himſelf; the profits only could be taken by a writ of *levari facias* directed to the ſheriff, who was thereby empowered to levy the profits ariſing from time to time for the benefit of the creditor. The common law was extremely jealous of obtruding any new tenant on the lord; it did not allow, therefore, any poſſeſſion to be taken under the *levari facias*, but only the profits to be levied. By the ſtatute of *Weſtm.* 2., which gave the writ of *elegit*, an alteration was introduced in this reſpect. By that act the creditor was permitted to make uſe of a proceſs by which he was put into poſſeſſion of the land itſelf. At all times, however, the king was entitled to take poſſeſſion under an extent, for the objection to changing the tenant did not apply to the caſe of the king. His right was independent of the ſtatute of *Weſtm.* 2.: but it muſt not be forgotten that while the common law remained unaltered the king never claimed any authority to take poſſeſſion of eccleſiaſtical rights or dues by the hands of his own miniſters the ſheriffs. He was always obliged to have recourſe to a writ to the biſhop, under which the lands were ſequeſtered. Under that writ poſſeſſion was not given, but the ordinary was bound to take care that out of the revenues of the church the duties of the church ſhould be provided for. We find in 2 *Inſt.* p. 4. that Lord *Coke* ſays, "if a perſon be bound in a recognizance in the Chancery, or in any other court, *&c.* and he pay not the ſum at the day, by the common law if the perſon had nothing but eccleſiaſtical goods the recognizee could not have had a *levari facias* to the ſheriff to levy the ſame of thoſe goods, but the writ ought to be directed to the biſhop of the dioceſe to levy the ſame of his eccleſiaſtical goods." In *Gilbert on Executions*, p. 40. it is ſaid, "*elegit* does not lie of the ——— or vi——— nor to the church-yard; for theſe are each *ſolum Deo conſecratum*;" and for this is cited *Jen-*"

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kins' Rep. 207. where the ſame doctrine is laid down; and alſo that no *capias* or *fieri facias* can iſſue againſt a clerk if it appears that he has no lay fee, but only a *levari facias* to the biſhop. *Jenkins* refers to two caſes from the Year-books, *viz.* 29 *Ed.* 3. 44. and 21 *Ed* 4. 45. We have therefore complete authority for ſaying, that at common law no proceſs ever iſſued to a ſheriff to levy on eccleſiaſtical property the debt due in an action, and *Gilbert* is well warranted in ſaying that no *elegit* lies. Sir *Wm. Blackſtone* in the 3d volume of the Commentaries, *p.* 418. gives an account of the writ of ſequeſtration to the biſhop of the dioceſe, which he ſays is in the nature of a *levari* or *fieri facias* to levy the debt and damages *de bonis eccleſiaſticis*, which are not to be touched by lay hands. The ſame account is given of the writ in *Burn's Eccl. Law*, tit. *Sequeſtration*. There has been much argument reſpecting the power which a clergyman had over his own benefice. It has never been contended however that a parſon was ever ſeiſed in fee, he had only a qualified right in his living, and at common law could make no leaſe to bind his ſucceſſor, unleſs confirmed by the patron and ordinary. In the reigns of *Hen.* 8. and *Eliz.* ſeveral ſtatutes were paſſed introducing further reſtrictions with reſpect to the power of eccleſiaſtics over their benefices. Until the 13 *Eliz. c.* 20. they all appear to have been made for the benefit of the ſucceſſor: ſo great was the anxiety of the legiſlature however to prevent eccleſiaſtics from diveſting their own rights, that the ſtatute of 13 *Eliz. c.* 20. explained by 18 *Eliz. c.* 11. empowers them to take advantage of their own non-reſidence to defeat leaſes made by themſelves. Such has been determined to be the effect of that ſtatute in the late caſe of *Frogmorton* d. *Fleming* v. *Scott*, 2 *Eaſt* 467. It is now clearly eſtabliſhed that the half pay of an officer is not aſſignable, and unqueſtionably any ſalary paid for the performance of a public duty ought not to be perverted to other uſes than thoſe for which it is intended. Notwithſtanding the caſe of *Stewart* v. *Tucker* (*a*), in which it was held that the half pay of an officer was aſſignable in equity, it was expreſsly decided in *Flarty* v. *Odlum* that it was no aſſignable at all, which deciſion met with general approbation This doctrine is very analogous to that which has been adopted with reſpect to eccleſiaſtics; the ſame policy is applicable to both caſes Having conſidered in what manner debts might be enforced againſt eccleſiaſtics at common law, I will now conſider whether the ſtatute

(*a*) 2 *Bl.* 113

relative

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relative to bankrupts and inſolvents have introduced any alteration in this reſpect. That a private creditor ſhould be able to avail himſelf of a writ of ſequeſtration for the purpoſe of ſatisfying his debt out of the benefice of a clergyman, and yet that where the legiſlature has veſted the whole property of the debtor in aſſignees for the benefit of the creditors in general, thoſe aſſignees ſhould not have any power to affect his benefice, would certainly be an anomaly in the law. Whether there be any means of obviating this anomaly I will not pretend to ſay. Lord *Hardwicke*, in the caſe *ex parte Meymott*, abſtains from laying down deciſively in what manner the claims of the aſſignees upon ſuch property might be made available. He ſeems however to think that in a writ to the biſhop the aſſignees might have the ſame remedy as any other creditor. But he never hints at an idea that they could take poſſeſſion of the benefice in the ſame manner as they might of lay property. The only queſtion in that caſe was, whether a clergyman could be made a bankrupt. Mr. *Wilbraham* in arguing for the negative inſiſted that his living could not be aſſigned by the commiſſion, for that the aſſignees muſt take all or none; and if they took all, nothing would be left to provide for the ſervice of the cure. Lord *Hardwicke*, who inclined to think that a clergyman might be a bankrupt, after noticing this objection, and ſtating the common law rule with reſpect to ſequeſtration, ſays, "I do not ſee, (but I give no opinion) why the ſame method may not be followed under the commiſſion of bankruptcy, for it does not appear to me that this would ſuperſede the biſhop's authority." As a long time has elapſed ſince this opinion was thrown out, during which ſome clergymen muſt probably have rendered themſelves obnoxious to commiſſions of bankrupt, I deſired inquiries to be made reſpecting the mode of proceeding adopted under thoſe commiſſions. But theſe inquiries have not produced any inſtance in which proceedings againſt a benefice have taken place. Nor ſhall I undertake to point out in what manner the aſſignees in this caſe muſt proceed. But although there may be difficulties in the mode of proceeding, we are not therefore to hold that the nature of the property which a clergyman has in his benefice is changed by the operation of an inſolvent act, or that the aſſignees under ſuch an act will be entitled to demand and receive eccleſiaſtical dues. The agreement in this caſe is a mere letter of attorney given by the clergyman to the Defendant. If this agreement could be deemed

a caſe,

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a lease, it would be void upon the face of it. It would be a lease on the parsonage house, with a covenant that the new tenant should occupy: this would be *felo de se*. Whatever advantage might be derived through the intervention of the ordinary, I am of opinion that by no conveyance of the party himself could he divest himself of his benefice. The same reasons which have induced the common law to prevent execution against a benefice by the hands of the king's civil ministers, may be urged with equal force against the action now brought by the assignees. We are therefore of opinion that the action is not maintainable so far as it relates to the rent which has accrued subsequent to the assignment under the insolvent act.

Per Curiam, Verdict to be entered for the Defendant.

Feb. 3d.

STRATTON and Another *v.* SAVIGNAC.

A replication to a plea of tender, stating an original writ sued out and returned before the tender, but not proceeded upon, and then a 2d original writ sued out after the tender and proceeded upon, but unconnected with the 1st writ, is no answer to the plea.

INDEBITATUS assumpsit for work and labour, goods sold and delivered, money lent and advanced, paid, laid out, and expended, had and received, and on an account stated.

The Defendant pleaded *non assumpsit* as to all but 9*l.* 15*s.* 4*d.*; and as to that sum he pleaded that "from the time of making the several promises and undertakings in the declaration mentioned he always hitherto was and still is ready to pay the same to the Plaintiffs; and before the suing out the original writ of the Plaintiffs, to wit, on 11th *February* 1802, at, &c. tendered and offered to pay the same to the Plaintiffs, which they refused to receive;" and the Defendant brought the said 9*l.* 15*s.* 4*d.* into court.

The Plaintiffs replied, that "as to 9*l.* 15*s.* 4*d.* parcel, &c. *præcludi non* from recovering more and greater damages than the said 9*l.* 15*s.* 4*d.* in that behalf, because they say, that after the making of the said promises and undertakings in the said declaration mentioned as to the said 9*l.* 15*s.* 4*d.*, (that is to say) on the 25th day of *January* 1802, at, &c. they the said Plaintiffs for the recovery of their damages by them sustained by reason of the non-performance of the said several promises and undertakings in the said declaration mentioned, as well as to the said sum of 9*l.* 15*s.* 4*d.* parcel, &c. as otherwise, caused to be sued and prosecuted out of the Court of our Lord the King of his Chancery, (the said Court then being held at *Westminster* in the county of *Middlesex*) a certain writ of our Lord the King, commonly called a writ of *quare*

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clauſum fregit, againſt the ſaid Defendant, directed to the ſheriff of *Middleſex*, by which ſaid writ our ſaid Lord the King commanded the ſheriff of *Middleſex*, that if the ſaid Plaintiffs ſhould give him ſecurity to proſecute their ſuit, then the ſheriff of *Middleſex* ſhould put by ſurety and ſafe pledges the ſaid Defendant that he ſhould be before our ſaid Lord the King's juſtices at *Weſtminſter* in eight days of the Purification of the Bleſſed *Mary* then next, to ſhew why with force and arms he broke the cloſe of the ſaid Plaintiffs at *Weſtminſter*, and did them other wrongs, to the great damage of the Plaintiffs, and againſt the peace of our ſaid Lord the King; and that the ſaid ſheriff ſhould have there the names of the pledges and that writ. At which day of the return of that writ, (that is to ſay) in eight days of the Purification of the Bleſſed *Mary*, in the 42d year aforeſaid, at *Weſtminſter* in the county of *Middleſex*, (that is to ſay) at *London* aforeſaid, in the pariſh and ward aforeſaid, the ſheriff of *Middleſex*, (to wit) *W. R.* Eſquire and *R. A. C.* Eſquire then being ſheriff of *Middleſex*, returned on the ſaid writ to the juſtices of our Lord the King of the Bench at *Weſtminſter*, that the ſaid Defendant in the ſaid writ named had not any thing in his bailiwick whereby he ſhould be attached; wherefore the ſaid Plaintiffs for the purpoſe aforeſaid prayed another writ of our Lord the King to be directed to the ſheriff of *Middleſex* in form aforeſaid. And it was granted them, *&c.* And thereupon the ſaid Plaintiffs for the recovery of their damages aforeſaid, afterwards, (to wit) on the *15th day of* April, *in the 42d year aforeſaid*, at, *&c.* aforeſaid, cauſed to be ſued and proſecuted out of the ſaid Court of our Lord the King of his Chancery (the ſaid Court then being held at *Weſtminſter* aforeſaid in the ſaid county of *Middleſex*) a certain other writ of our Lord the King, commonly called a writ of *quare clauſum fregit*, againſt the ſaid Defendant, directed to the ſheriff of *Middleſex*,"—(proceeding as with the former writ, and alleging that being ſummoned upon this 2d writ the Defendant appeared.) " And the ſaid Plaintiffs further ſay, that the ſaid ſeveral writs ſo by them ſued and proſecuted as aforeſaid againſt the ſaid Defendant, were ſo by them ſued and proſecuted againſt the ſaid Defendant with intent to implead the ſaid Defendant for the ſeveral cauſes in the ſaid declaration in this behalf above ſpecified, and to cauſe and compel the ſaid Defendant to appear in the ſaid Court here in order that they the ſaid Plaintiffs might declare againſt him for the

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ſaid ſeveral cauſes of action in the ſaid declaration mentioned, according to the courſe, cuſtom, and practice of the ſaid Court here. And they the ſaid Plaintiffs, in purſuance of ſuch their ſaid intention, did, after ſuch the ſaid appearance of the ſaid Defendant as aforeſaid, declare thereupon and for the ſaid ſeveral cauſes of action in the ſaid declaration mentioned in manner and form aforeſaid, and therein (amongſt other things) for the ſaid ſum of 9*l.* 15*s.* 4*d*, parcel, &c. and for the damages by them ſuſtained on occaſion of the not performing the ſaid ſeveral promiſes and undertakings in the ſaid declaration mentioned as to the ſaid 9*l.* 15*s.* 4*d.* And the ſaid Plaintiffs further ſay, that the ſaid Defendant did not at any time before the ſuing forth of the ſaid firſt-mentioned writ out of the ſaid Court of our ſaid Lord the King of his Chancery, in manner and for the cauſe and purpoſe aforeſaid, tender or offer to pay to the ſaid Plaintiffs the ſaid ſum of 9*l.* 15*s.* 4*d.*, parcel, &c. And this, &c. Wherefore, &c."

The Defendant rejoined, that "true it is that the ſaid Defendant did not at any time before the ſuing forth of the ſaid writ in the ſaid plea of the ſaid Plaintiffs above pleaded in reply firſt mentioned, tender or offer to pay to the ſaid Plaintiffs the ſaid ſum of 9*l.* 15*s.* 4*d.*, parcel, &c.; but the ſaid Defendant ſays, that the ſaid Defendant before the ſuing out of the ſaid writ in the ſaid plea of the ſaid Plaintiffs above pleaded in reply, ſecondly above mentioned, (to wit), on the ſaid 11th day of *February*, in the ſaid year of our Lord 1802, at, &c. tendered and offered to pay to the ſaid Plaintiffs the ſaid 9*l.* 15*s.* 4*d.*, which ſaid 9*l.* 15*s.* 4*d.* the Plaintiffs then and there wholly refuſed to receive from the ſaid Defendant. And this, &c. Wherefore, &c."

To this there was a general demurrer, and joinder therein.

Bayley Serjt. in ſupport of the demurrer, after citing the ſeveral caſes of *Giles* v. *Hartis*, 1 *Ld. Raym.* 254. *Sweetland* v. *Squire*, 2 *Salk.* 623. and *Clemens* v. *Reynolds*, *Say.* 18. to ſhew that a plea of tender which does not allege that the Defendant was always from the time when the cauſe of action accrued ready to pay, is bad upon demurrer, was proceeding to argue that the firſt writ of *quare clauſum fregit* in this caſe appearing to have been regularly ſued out previous to the tender pleaded, the Defendants' rejoinder could not be ſuſtained,

When *The Court* interrupted him by obſerving, that however regularly the firſt writ was ſued out, ſtill it did not appear to have

been properly continued (*a*), and therefore could not be connected with the second writ so as to avail the Plaintiffs. 1803.

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Bayley then urged, that merely suing out process was a demand, and consequently the tender was not good unless made previous to that demand.

But *The Court* were clearly of opinion that the mere circumstance of process sued out was not sufficient, since possibly it might be for some other cause of action, and if allowed to operate in the way contended for, would open a door to much inconvenience by enabling persons to keep such process secretly in their pockets 'till such stage of the pleadings as they should be disposed to bring it forward.

Per Curiam, Judgment for the Defendant.

Haywood Serjt. was to have argued *è contrà*.

(*a*) See 2 *Ld. Ray.* 434.

POLLARD *v.* Sir ROBERT HERRIES Knt.

Feb. 3d.

THIS was an action of *assumpsit* brought on a promissory note, of which the following is a literal copy:

Branche à

Paris *ce* 20 Mai 1791 *Pr* 1200 *Tournois*

En face du Pont Royal.

A sept jours de vue prèfixe je payerai a l'ordre de Monsieur John Carter Pollard *la somme de douze cents livres Tournois avec l'interêt convenu à raison de trois pour cent par an, valeur reçu comptant.*

Per procn. de Sir Robt. Herries.
Présenté et verifié à — *le* 17
Au cours d'Usance sur Paris.
JAMES CARTY.

Payable, comme dessus, dans Paris, *au choix du porteur, dans* Douvres *à* l'Union Bank, *et dans* Londres *à mon domicile ordinaire*

En registre fol. 42 A. F. P."

10th *May* 99. E. W.

A. deposited a sum of money at the banking-house of *B.* in *Paris*, for which *B.* gave him his note "payable in *Paris*, or at the choice of the bearer at the *Union* Bank in *Dover*, or at my usual residence in *London*, according to the course of exchange upon *Paris*," after this note was given the direct course of exchange between *London* and *Paris* ceased altogether, having been previous to its total cessation extremely low; the note was at a subsequent period presented for acceptance and payment at the residence of *B.* in *London*, at which time there was a circuitous course of exchange upon *Paris* by way of *Hamburgh*. Held that *A.* was entitled to recover upon the note according to such circuitous course of exchange upon *Paris* at the time when the note was presented.

Which

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Which promiſſory note was thus tranſlated:

Paris, the 20th of *May* 1791—For 1200 livres Tournois.

At ſeven days ſight, according to agreement, I promiſe to pay to the order of Mr. *John Carter Pollard* the ſum of twelve hundred *livres Tournois*, with the intereſt agreed for, at the rate of three *per cent. per annum*, value received down.

Payable as above in *Paris*, or, at the choice of the bearer, at the *Union* Bank in *Dover*, or at my uſual reſidence in *London*, according to the courſe of exchange upon *Paris*.

By procuration of Sir *Robt. Herries*.
James Carey.

Preſented and verified at ——— 17.

The two firſt counts of the declaration were upon the ſaid note. In the firſt count the words "au cours d'uſance ſur *Paris*" were taken to mean "according to the courſe of exchange upon *Paris*." In the ſecond count theſe words were wholly omitted. The third count was upon an *indebitatus aſſumpſit* for the value of foreign money paid, laid out, and expended by the Plaintiff for the uſe of the Defendant. The fourth was for the value of foreign money lent and advanced by the Plaintiff to the Defendant. The fifth was for the value of foreign money had and received by the Defendant to the uſe of the Plaintiff. And the ſixth was upon an account ſtated between the Plaintiff and Defendant. To this declaration the Defendant pleaded the general iſſue, and paid into Court the ſum of 18*l.* 16*s.* 6*d.* upon the whole declaration generally.

This cauſe was tried before Lord *Eldon* Ch. J. and a ſpecial jury at the *Guildhall* ſittings after *Hilary* term 1801, when a verdict was found for the Plaintiff for 40*l.* 6*s.* 10*d.* damages, ſubject to the opinion of the Court upon the following caſe:

For a long time previous to the *French* revolution, and for ſome time ſubſequent to that period, the Defendant kept a banking-houſe at *Paris*, into which many perſons on their travels were accuſtomed to pay their money, for which they took promiſſory notes ſimilar in form to that which is the ſubject of the preſent action. On the 20th of *May* 1791 the Plaintiff paid into the Defendant's banking-houſe at *Paris* the ſum of 1200 *livres Tournois* in aſſignats, then the circulating medium of *France*, which were received at the Defendant's ſaid banking-houſe in caſh, and for which the Plaintiff received the above promiſſory note. On the

10th *May* 1799 the ſaid note was preſented for acceptance, and again on the 20th of the ſame month for payment in *London*, at the uſual reſidence of the Defendant. When there was a courſe of exchange between *London* and *Paris* it was regulated by the *écu* or *French* crown of three *livres Tournois*, in ſterling pence; and when this exchange was at par the *French* crown was of the value of thirty pence ſterling. At the time when the ſaid note was made and delivered to the Plaintiff there was a direct courſe of exchange between *London* and *Paris* at the rate of 24 pence ſterling for the *French* crown. In the month of *Auguſt* in the year 1793, in conſequence of the war, the exchange fell ſo low as four-pence farthing for the *French* crown of three *livres Tournois*, and in the month of *October* following it finally cloſed at nine-pence for the *French* crown. On the 20th *May* 1799, the time when the ſaid note was preſented for payment in *London*, as the war was ſtill continuing between *Great Britain* and *France*, there was no direct courſe of exchange between *London* and *Paris*; but there was then, and there ſtill is, a circuitous courſe of exchange between thoſe cities through *Hamburgh*. At that time, according to the courſe of exchange between *Paris* and *Hamburgh*, 1200 *livres Tournois* were of the value of 589 marks and 7 *ſchelins*, and this ſum, according to the courſe of exchange at the ſame time between *Hamburgh* and *London*, was of the value of 47*l.* 3*s.* 4*d.* ſterling, which ſum, together with 12*l.*, the intereſt thereof at 3 *per cent. per ann.* for 8 years, from the 20th of *May* 1791 to the 20th of *May* 1799, making together the ſum of 59*l.* 3*s.* 4*d.*, was the amount of the ſum claimed to be recovered by the Plaintiff in this action, as being the value of the ſaid note on the ſaid 20th *May* 1799, when it was preſented in *London* for payment, according to the above circuitous courſe of exchange. But the ſum of 18*l.* 16*s.* 6*d.* was paid into court by the Defendant, as being the value of the ſaid 1200 livres and the intereſt thereon at 3 *per cent. per ann.*, taking the exchange at 9*d.* ſterling for the *French* crown of three livres, according to the laſt direct courſe of exchange between *London* and *Paris* before the commencement of the war. The queſtion ſubmitted to the opinion of the Court was, Whether the Plaintiff were entitled to recover the above ſum of 59*l.* 3*s.* 4*d.*, the value of the ſaid 1200 livres and intereſt, according to the courſe of exchange between *London* and *Paris* through *Hamburgh*

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Marshall Serg. for the Plaintiff. The question in this case is, by what course of exchange the Plaintiff is to be paid; whether by the last direct course of exchange which existed previous to the commencement of the war between this country and *France*, or by the circuitous course which existed at the time when payment of the note was demanded? The note in question is for 1200 livres payable at *Paris*, *Dover*, or *London*. Now if demanded at either of the two latter places, it must have reference to some existing course of exchange; though if demanded at *Paris* it would be unnecessary to calculate any course of exchange, as it would be paid by the precise amount of *French* money mentioned in the bill. Although the direct intercourse between this country and *France* was interrupted at the time when payment of the note was demanded, still there could be no difficulty in paying it according to the existing course of exchange. The mode by which a merchant would effect this, would be to purchase a bill upon *Hamburgh* in *London*, which bill, when transmitted to *Hamburgh*, would purchase another upon *Paris*. It is true that the Defendant will be a sufferer by this mode of payment, but that consideration cannot excuse him from the performance of his contract: for the general rule of law is, that even the impossibility of performing a contract will not excuse the contracting party, unless that impossibility arise from the interposition of the law. The case states what was the best course of exchange for the Defendant at the time when the bill was demanded; and as the Defendant has undertaken to pay according to the course of exchange, there being no direct exchange, he must perform it *cy près*; namely, by adopting the shortest circuitous

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cuitous mode of exchange. A queſtion ſimilar to this aroſe before Lord *Kenyon* at *niſi prius*, who decided it immediately, ſaying, if the high road be out of repair, the party muſt go on the adjoining land. So in *Cuming* v. *Monro*, 5 *T. R.* 67 in debt for 1400*l.* of money of *Great Britain*, on a bond for 2400*l.* proclamation money of *North Carolina*, the Court refuſed to allow the Defendant to pay the 2400*l.* *Carolina* money into court, ſaying, "This proclamation money was of a certain value when the bond was given, and alſo when it was forfeited; but by change of time and circumſtances it is now rendered of no value whatever, and therefore juſtice could not be done between the parties if we were to determine that the Defendant ſhould be at liberty to pay that which is now of no value, but which, had he paid his debt when it became due, would have been of great value." If it be ſaid that the Plaintiff ought to have preſented the note ſooner; the anſwer is, there is nothing on the face of the bill to prevent his keeping it for any number of years which he might think proper: and, indeed, had it not been for the interruption of the exchange the Defendant would have derived an advantage from his not preſenting the note ſooner, ſince he allowed only 3 *per cent* for the money depoſited, which was the conſideration of the note, and made a larger intereſt himſelf.

Williams Serjt. *contrà*. If the Defendant pays this bill according to the laſt courſe of exchange between *London* and *Paris* he will perform his contract as nearly as poſſible; and the Plaintiff will ſuffer juſtly for not having preſented it ſooner. The words "*au cours d'uſance*" can only be explained by conſidering the nature of the note: the import of which is this; "If you do not receive the money at *Paris*, then I will pay it at *Dover* or in *London*, according to ſuch uſance as ſhall exiſt with reſpect to bills upon *Paris* at the time when payment ſhall be demanded." The mode of payment, therefore, in contemplation of the parties in caſe of the note being demanded at *London* or *Dover* ſeems to have been by a bill upon *Paris*. Admitting this interpretation, the word "uſance" is an underſtood mercantile term, and, as applied to bills, differs according to the places upon which they are drawn. [*The Court* obſerved, that as the jury had tranſlated the words "*au cours d'uſance*" they ſhould adhere to that tranſlation.] At the time when this note was preſented, the preciſe performance of the contract had become impoſſible; for no direct courſe of

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exchange between *London* and *Paris* exiſted. The Defendant therefore is excuſed; for the rule of law, as laid down in *Paradine* v. *Jane*, *Aleyn*, 27. is, that "when a party by his own contract creates a duty or charge upon himſelf, he is bound to make it good, *if he may*, notwithſtanding any accident by inevitable neceſſity, becauſe he might have provided againſt it by his contract." But in this caſe the Defendant was abſolutely prevented by change of circumſtances, and by the neglect of the Plaintiff in preſenting the note ſooner. He will therefore be excuſed if he perform his contract "*cy prés*" according to the laſt direct courſe of exchange between *London* and *Paris*. If, however, the Court ſhould think that this is not the proper rule, then it may be contended that the action has been brought too ſoon, and that the Plaintiff ſhould have waited until a direct courſe of exchange between *London* and *Paris* was renewed. If the conſtruction contended for by the Plaintiff be adopted, the Plaintiff, by keeping the note, may oblige the Defendant to pay it in a manner totally different from that which was contracted for, and which may amount to fifty times as much as was in the contemplation of the parties.

Lord ALVANLEY Ch. J. The argument of my Brother *Williams* muſt neceſſarily go the length of contending, that at the time when payment of the note in queſtion was demanded no courſe of exchange between *London* and *Paris* whatſoever exiſted. If his argument will not go this length, I think that he cannot ſucceed. At firſt I entertained ſome doubts whether at the time when the note was made it was not the intention of the parties that the money ſhould be paid according to the direct courſe of exchange only, and conſequently whether this circuitous courſe of exchange which has been ſet up could poſſibly regulate the payment. The principles laid down at the bar, reſpecting the force of obligations created by a party againſt himſelf, are not to be controverted; nor can it be diſputed that whatever be the nature of the contract into which a ſubject of this country enters, he is excuſed from the performance of it, if the laws of his country interpoſe and forbid the performance. The Defendant therefore in this caſe was moſt clearly excuſed from that part of his contract which impoſed upon him the neceſſity of paying the 1200 livres at *Paris*, becauſe ſuch payments at the commencement of the war between this country and *France* were forbidden by law. But in this contract there are two other terms; for the Defendant engages to pay not only at

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Paris, but at *Dover* or *London*. What reaſon then has he given for not performing his contract when payment of it was demanded in *London*? He ſays that he engaged to pay according to the courſe of exchange between *London* and *Paris*, and that at the time he ſo engaged the courſe of exchange in contemplation between himſelf and the Plaintiff was the direct courſe of exchange between thoſe two places. Having ſhewn then that no direct courſe of exchange exiſted at the time when payment of the note was demanded, the Defendant offers to pay according to the laſt direct courſe of exchange which exiſted before that time. But the Plaintiff has a right to diſpute this mode of payment which the Defendant thinks proper arbitrarily to adopt, and may as well contend that he chuſes to be paid according to the courſe of exchange which exiſted at the time when the money was depoſited. I think therefore that we cannot with propriety refer to any courſe of exchange previous to the demand of payment, but that according to the ordinary rules of conſtruction the Defendant is bound to perform his contract notwithſtanding intervening circumſtances may have ſubjected him to ſome inconvenience. The peculiar circumſtances of the late war induced the legiſlature of this country to do what had never been done before, unleſs perhaps in the time of King *William*, namely, to prohibit under certain penalties the ſubjects of this country from remitting money to *France*. In conſequence of this, a much more circuitous and expenſive courſe of exchange was neceſſarily adopted; and the Defendant being called upon to pay in *London* according to that circuitous and expenſive courſe, ſuffers a hardſhip. Whatever doubts, however, I may have entertained, I now think that the ſoundeſt conſtruction for us to adopt, and which will be ſubject to the leaſt inconvenience, is, that the Defendant is bound to pay the note according to that indirect courſe of exchange which exiſted at the time when payment was demanded. The Plaintiff therefore will be entitled to the larger ſum found by the jury.

HEATH J. I have very little difficulty upon this ſubject: for though I agree that neither of the parties contemplated the interruption in the courſe of exchange which the war produced; yet let us conſider what was the real nature of the contract between the parties. The Defendant received a ſum of money from the Plaintiff, for which he was to pay a very ſmall intereſt; clearly therefore it could not be worth the Defendant's while to keep the

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bill in his hand merely upon the ſpeculation of making an advantage of it by ſome alteration in the courſe of exchange; and indeed the longer he kept the note the longer the Defendant had to make a large intereſt of money, for which he paid the Plaintiff but a ſmall intereſt. The contract between the parties being that the Defendant ſhould pay according to the courſe of exchange between *London* and *Paris*, and that contract not being unlawful, the Defendant muſt fulfil his engagement when called upon, notwithſtanding circumſtances may have rendered that engagement diſadvantageous to him.

ROOKE J. I am of the ſame opinion. According to the courſe of dealing eſtabliſhed by the Defendant, he received a depoſit of money from perſons upon their travels, allowing them only three *per cent.* intereſt, and gave them notes payable at *Paris*, *Dover*, or *London*. It was underſtood between the parties that the perſons to whom theſe notes were given might keep them as long as they ſhould find it convenient, and the Defendant undertook that when they choſe to demand payment of them, he would pay according to the courſe of exchange upon *Paris*. Now the ſhorteſt courſe of exchange upon *Paris* at the time when payment was demanded was by way of *Hamburgh*, and the Plaintiff only deſires to be paid according to that courſe. The Defendant therefore, unleſs he can ſhew a ſhorter courſe to have exiſted at that time, muſt pay the note according to the courſe of exchange through *Hamburgh*. Whatever inconvenience he may ſuffer from this conſtruction, he muſt attribute to himſelf alone for not having guarded againſt it by the terms of his contract.

CHAMBRE J. We muſt recollect that this is a loan by the Defendant to the Plaintiff, not of a bill of exchange, but of his promiſſory note given for money depoſited with him. That note was intended to ſerve other purpoſes than that of merely ſecuring re-payment of the money depoſited, and in contemplation of the peculiar accommodation which he was to derive from this note, the Plaintiff parted with this money at a leſs rate of intereſt than he might otherwiſe have reaſonably demanded. It certainly was not in the contemplation of either party that any inconvenience could ariſe from the Plaintiff not preſenting the note for payment ſooner than he did. That circumſtance however makes it neceſſary to decide what mode of payment ſhall now be adopted. The mode pointed out on the face of the contract is the courſe of exchange

or

on *Paris*; and indeed I do not think that the terms of the note could have been tranſlated otherwiſe than they have. The note does not expreſs that the money ſhall be paid at the uſual courſe of exchange, or at the courſe of exchange ſubſiſting between the two countries at the time when the ſecurity was given, but merely according to the courſe of exchange. Then to what are we to look, but to the courſe of exchange actually ſubſiſting between *London* and *Paris* when payment was demanded? Probably there were many other more circuitous courſes of exchange on *Paris*, but the neareſt is pointed out by the caſe, and the Plaintiff's demand aſſeſſed accordingly. Whatever loſs the Defendant may have ſuſtained by the interruption of the direct courſe of exchange, I think the contract capable of no other conſtruction, and that the Plaintiff is entitled to the larger ſum.

Verdict to be entered for the Plaintiff for 101*l.* 6*s.* 10*d.*

MANNERS *qui tam* v. POSTAN.

Feb. 4th.

In an action on the ſtatute of uſury for taking more than legal intereſt on a loan of money "from the 15th of *April* to the 14th of *July* 1802," the Court will amend the verdict by the Judge's notes if the jury, by miſtaking the date of an inſtrument, create a variance for which the evidence affords no foundation. If more than legal intereſt be taken for forbearance on a note given to *A.* by *B.* as a collateral ſecurity for money lent to *C.*, ſuch uſury is well deſcribed to be for forbearance of money *lent* by the Defendant to *B.*

THIS was an action on the ſtatute of uſury. The 1ſt count of the declaration ſtated that the Defendant on the 5th of *Auguſt* 1802, by means of a corrupt contract made between the Defendant and one *Richard Lowe*, "took, accepted, and received of and from the ſaid *Richard Lowe* 5*l.* for the forbearing and giving day of payment, and for the having forborne and given day of payment to the ſaid *Richard Lowe* 50*l.* lent by the Defendant to the ſaid *Richard Lowe* on the 15th *of April* 1802, from the ſaid time of the ſaid lending of the ſaid 50*l.* until the 14th of *July* 1802." There were ſeveral other counts not material to be here ſtated. The cauſe was tried before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after laſt *Michaelmas* term, when it appeared that the Plaintiff being indebted to one *Dance* in the ſum of 111*l.* 10*s.* gave a warrant of attorney to ſecure that ſum, and that *Richard Lowe* alſo gave his note for the ſame ſum, dated the 12th *October* 1801, payable to *Dance* or order at ſix months, as a collateral ſecurity, which became due on the 15th of *April* 1802; that this note was indorſed by *Dance* to the Defendant; that on the 12th or 13th of *April Richard Lowe* applied to the Defendant's

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ſon to accept 61*l.* 10*s.* in part payment, and a warrant of attorney at three months for the remainder, for which indulgence and the expences he offered three guineas; that the propoſal being accepted, *Richard Lowe* paid 64*l.* 14*s.* (*a*), and gave the warrant of attorney, at the ſame time aſking for his note and the former warrant of attorney given by the plaintiff, which the Defendant's ſon promiſed to ſend, but ſtated that they were at that time in his father's poſſeſſion; that on the 15th of *April* one *Thomas Gale* called on *Richard Lowe* from the Defendant, and returned the 64*l.* 14*s.* and the warrant of attorney for 50*l.*, ſtating that the Defendant objected to what had been done, but afterwards produced a blank warrant of attorney for 55*l.*, dated the 14th of *April*, which he requeſted *Richard Lowe* to execute, and in caſe of his non-compliance threatened that the Defendant would proceed upon the note; and that *Richard Lowe* accordingly again paid the 64*l.* 14*s.* and executed the laſt-mentioned warrant of attorney, which was paid on the 5th of *Auguſt* in the ſame year. The jury found a verdict for the Plaintiff, ſtating that the Defendant took 5*l.* for the uſe of 50*l.* from the *14th of April* to the 14th of *July*.

On a former day a rule *niſi* was obtained, calling upon the Defendant to ſhew cauſe why the above general verdict ſhould not be amended by the Judge's notes, and why it ſhould not be entered on the 1ſt count of the declaration only, and at the ſame time another rule *niſi* was obtained, calling upon the Plaintiff to ſhew cauſe why a nonſuit ſhould not be entered on the ground that the evidence did not ſupport the averment in the 1ſt count of the declaration that the uſurious intereſt was taken for the forbearance of money lent.

Shepherd Serjt. for the Defendant now contended, 1ſt, that in order to ſupport the preſent action it was eſſential that the contract ſhould be found as ſtated in the declaration; and that as there was a material variance between the finding of the jury and the tranſaction as pleaded, the Court could not enter a verdict for the Plaintiff upon the preſumption that the jury had proceeded upon a miſtake; that although it appeared in evidence that the warrant of attorney was executed on the 15th of *April*, yet as the jury had found that the uſurious intereſt was taken "for the uſe of 50*l.* from the 14th of *April* to the 14th of *July*," it muſt be preſumed

(*a*) This ſum exceeds what was intended to be advanced by 1*s.* only, becauſe the Defendant's ſon had no charge.

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that the intereſt was computed from the 14th of *April*, which would vary the tranſaction moſt eſſentially from that ſtated in the declaration; and that although it had been uſual to ſet right the miſtake of a jury by the Judge's notes where the verdict was general, yet that where the jury had found a particular fact incorrectly, there was no means of rectifying that miſtake but by ſending the caſe to a new trial. 2dly, That no money was ever lent by *Poſtan* to *Lowe*, as averred in the declaration; for that the uſurious intereſt was taken for the forbearance of 50*l.* due upon a promiſſory note which *Lowe* had given as a collateral ſecurity for the debt of a third perſon, which could not conſtitute a loan from the Defendant to *Lowe*.

Marſhall Serjt. for the Plaintiff inſiſted, 1ſt, That where a manifeſt miſtake occurred in the finding of the jury, the Court would of courſe rectify that miſtake by the Judge's notes; and obſerved, that ſuch amendment had been allowed even in a ſpecial verdict; that in the preſent caſe there was no evidence whatever from which the jury could have preſumed that intereſt was calculated from the 14th of *April*; that the note itſelf did not become due till the 15th; and that it was evident the jury had been miſled by the circumſtance of the warrant of attorney having borne date as of the 14th. 2dly, That as the Defendant was entitled to receive 50*l.* from *Lowe* on the 15th of *April*, which he then agreed ſhould remain three months longer in the hands of *Lowe*, it was equivalent to a loan of that ſum. He cited *Floyer* v. *Edwards*, *Cowp.* 112. where Lord *Manſfield* expreſſed a clear opinion, that if a tranſaction be in ſubſtance a loan, it muſt be conſidered as ſuch whatever may be the form of the tranſaction.

The Court were clearly of opinion, that, as there was no evidence from which it could have been inferred that intereſt was computed from the 14th of *April*, the verdict might be entered according to the notes of the Judge, without exceeding the line which had been already adopted in caſes of this ſort: though if any evidence had been given from which it would have been competent for the jury, had they believed it, to have found as they had done, the Court could not have rectified the miſtake, but muſt have granted a new trial. With reſpect to the 2d point, they thought the tranſaction was equivalent to a loan of money, and referred to *Wade q. t.* v. *Wilſon*, 1 *Eaſt*, 195.

Rule abſolute for the amendment.
Rule diſcharged for the nonſuit.

Feb. 11th.

Lord NORTHWICK *v.* STANWAY.

If there be a cuſtom within a manor for a lord to grant parcels of the waſte by copy of court-roll, the premiſes granted in the above mode are well deſcribed as copyhold premiſes, though the date of the grant be modern. If an aſſeſſment of a copyhold fine be entered in the court-rolls as of 100*l.*, but that out of eſpecial favour the lord remitted 40*l.* and thereby reduced it to 60*l.*, and the lord ſue for the fine, and the jury, finding the annual value of the premiſes 30*l.*, give a verdict for 60*l.*, the lord cannot retain the verdict for the ſum actually due, but muſt make a new aſſeſſment, the old aſſeſſment, notwithſtanding the remitter, being in law an aſſeſſment as of 100*l.*

INDEBITATUS aſſumpſit. The 1ſt count ſtated, "that the Defendant on, &c. was indebted to the Plaintiff, then and ſtill being lord of the manor of *Harrow*, otherwiſe *Sudbury*, in the county of *Middleſex*, in 200*l.* for reaſonable fines due and payable by the Defendant to the Plaintiff for and on his admiſſion, according to the cuſtom of the ſaid manor, into divers copyhold tenements, with the appurtenances, parcel of the ſaid manor, into which he had by the Plaintiff, before that time and whilſt he was lord of the ſaid manor, been admitted according to the cuſtom of the ſaid manor, to hold the ſame, with the appurtenances, to the Defendant, his heirs and aſſigns, by copy of court-roll, at the will of the lord and according to the cuſtom of the ſaid manor." There were other counts for money paid, had, and received, and on an account ſtated. The Defendant pleaded the general iſſue.

At the trial before Lord *Alvanley* Ch. J. at the *Weſtminſter* Sittings after laſt *Michaelmas* term, it appeared that the premiſes for which the fine was claimed were ſome time ſince parcel of the waſte of the manor, and were firſt granted by the then lord to hold by copy of court-roll; that within the manor there was a cuſtom for the lord to grant parcels of the waſte whenever he ſhould think proper, to hold by copy of court-roll; that there were many tenements within the manor which had been holden immemorially by copy of court-roll, and many which had been granted in the above manner out of the waſte, the one being called ancient copyhold and the other waſte-hold copyhold, and that the tenants of the former were entitled to ſome privileges to which the tenants of the latter were not entitled; that upon the Defendant's admiſſion, the following entry was made upon the rolls; "And the lord of the manor aſſeſſed a fine of 100*l.* for his admiſſion to the ſaid premiſes, but out of eſpecial grace remitted 40*l.* thereof, which has reduced the fine to 60*l.*" The jury found that the annual value of the premiſes was 30*l.* and gave a verdict for the Plaintiff for 60*l.* being two years annual value.

Shepherd Serjt. on a former day moved for a rule calling on the Plaintiff to ſhew cauſe why a nonſuit ſhould not be entered; 1ſt, becauſe the premiſes on which the fine was claimed ought not to have been deſcribed as copyhold; he inſiſted that it was of the eſſence of copyhold tenure that the premiſes ſhould have been demiſed and

demiſeable

demiſeable by copy of court-roll from time immemorial; whereas it appeared in the preſent caſe that the premiſes had been parcel of the waſte within time of memory, and that although a cuſtom might have exiſted within the manor for the lord to grant tenements out of the waſte, upon admiſſion to which a fine might be demandable by virtue of the cuſtom, yet that in declaring for ſuch fine the nature of the tenure ſhould have been correctly ſtated in the declaration; 2dly, becauſe the aſſeſſment by the lord being 100 *l.*, which the finding of the jury had proved to be too heavy a fine, the lord's right to recover could not be complete until a new aſſeſſment had been made; for although it appeared that out of eſpecial favour he had remitted 40 *l.* and reduced the fine to 60 *l.*, ſtill the fine muſt be conſidered as a fine of 100 *l.* and aſſeſſed as ſuch, though the payment had been remitted in part. On this point he cited *Aſtle* v. *Grant*, *Doug.* 731. *n.* 4. ed. 5.

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With reſpect to the 1ſt point, *The Court* obſerved, that although the premiſes in queſtion had been newly granted by copy of court-roll, yet that having been granted by virtue of an immemorial cuſtom to demiſe parcels of the waſte as copyhold, they were to be conſidered as much copyhold tenements as if they had been immemorially holden by copy of court-roll; that the tenure had its foundation in cuſtom, which had immemorially attached upon the waſte, the ſubject of the grant; that copyholds of a ſimilar deſcription to thoſe in queſtion were very common in the North of *England*, and had often been recogniſed in judicial determinations; and *Chambre* J. added, that within his recollection tenures of this kind had been judicially acknowledged at *Durham*, and in ſome inſtances the queſtion had been raiſed in ſuch a mode that it might have been removed from the court there to *Weſtminſter-hall*, if the counſel had not been ſatisfied with the propriety of the determination. With reſpect to this point (*a*), therefore, it was intimated by the Court, that unleſs a ſtrong opinion to the contrary was entertained at the bar, they did not wiſh to have it agitated (*b*); but on the 2d point granted a rule *niſi*.

(*a*) This point very ably diſcuſſed by Mr. *Watkins* in his treatiſe on *Copyholds*, p. 33. to p. 36., and the ſeveral authorities on the ſubject are there collected by him in the notes; from thoſe authorities, and particularly from *Co. Litt.* 58. *b.* it is clearly ſhewn that land need not immemorially have been *demiſed* as copyhold, though it muſt have been *demiſeable* as ſuch. Mr. *Watkins*, indeed, ſeems to think that even without the aid of a cuſtom, the lord of a manor may grant the waſte of the manor as copyhold, and thereby effectually create a new copyhold tenure.

(*b*) On a ſubſequent day *Shepherd* abandoned this point.

Beſt

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Beſt Serjt. now ſhewed cauſe, and contended that, as the lord had demanded no more than 60*l.*, which appeared by the finding of the jury to be two years' value, he was entitled to recover; that it appeared from *Titus* v. *Perkins*, *Skin.* 249. that if a lord demand more than he ought he may make his demand *de novo*, and that the entry upon the rolls in this caſe ſhewed that although the lord aſſeſſed the fine at 100*l.* he only intended to inſiſt upon 60*l.*; that this entry could never prejudice the tenant, ſince it would afford no evidence that two years' value amounted to 100*l.* for that a copyhold fine is at all times an arbitrary fine in point of form, though it is now ſettled that the lord cannot take more than two years' value; and that the 100*l.* therefore might always be deemed the formal fine impoſed by the lord, and the 60*l.* the two years' value on which he had a right to inſiſt.

The Court, however, (*a*) (without hearing *Shepherd*,) were of opinion that the aſſeſſment was an aſſeſſment of 100*l.*, and that the latter part of the entry was nothing more than a remiſſion of the payment of part of that aſſeſſment, and that much miſchief might ariſe to copyholders if ſimilar entries were permitted to be made upon the court-rolls of manors.

Rule abſolute.

(*a*) Mr. Juſtice *Heath* was abſent on this day, but was preſent when the 1ſt point was moved and conſidered.

Feb. 12th.

COBB *v.* BRYAN.

If to an avowry for 120*l.* rent in arrear the Plaintiff plead "that the ſaid 120*l.* is not due," and the defendant join iſſue thereon, and at the trial it appears that 24*l.* only is due, upon which the Plaintiff objects that the evidence does not ſupport the iſſue joined by the Defendant; yet if a verdict be taken for 24*l.* ſubject to the opinion of the Court, ſuch finding will cure the defect in the formality of the iſſue.

REPLEVIN. The Defendant avowed for rent of certain apartments in a dwelling-houſe demiſed by him to the Plaintiff, at the yearly rent of 24*l.*, payable quarterly, and becauſe 120*l.* of the rent aforeſaid "due and payble by the Plaintiff to the avowant for five years ending and ended on the feaſt-day of the Annunciation 1802," was in arrear, the goods mentioned in the declaration were diſtrained. The Plaintiff pleaded in bar, 1ſt, that he did not enjoy the ſaid apartments for the ſaid five years under the ſaid demiſe; 2dly, that he did not hold the ſaid apartments at the rent aforeſaid; 3dly, "that the ſaid 120*l.* of the rent aforeſaid were not due and payable by the Plaintiff to the avowant for five years

ending and ended on the ſaid feaſt-day of the Annunciation of the Bleſſed Virgin *Mary* in the year 1802 aforeſaid, in manner and form as the ſaid avowant hath in and by his ſaid avowry alſo above alleged;" and, 4thly, "that the ſaid 120 *l.* of the rent aforeſaid in the ſaid avowry of the ſaid Defendant in this behalf above alleged to have been due and payable by the Plaintiff to the avowant for five years of the ſaid term ending and ended on the ſaid feaſt-day of the Annunciation of the Bleſſed Virgin *Mary* in the year 1802 aforeſaid were not in arrear and unpaid to the avowant at the ſaid time when, &c. in manner and form as the avowant hath in and by his ſaid avowry alſo above alleged." On each of theſe four pleas iſſue was joined.

At the trial of this cauſe before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after laſt *Michaelmas* term, it being proved that 24 *l.* only was due for rent, it was objected on the part of the Plaintiff that ſuch evidence did not ſupport the 3d and 4th iſſues, and conſequently the Plaintiff was entitled to a verdict on thoſe iſſues. His lordſhip being diſpoſed to reſerve this point, a verdict was taken for the avowant on all the iſſues for 24 *l.*, with liberty to the Plaintiff to move to enter a verdict for himſelf on the 3d and 4th iſſues.

Accordingly a rule *niſi* for that purpoſe having been obtained on a former day,

Bayley Serjt. now ſhewed cauſe. Under an avowry for a larger ſum the avowant may well have a verdict for a leſs ſum, as was the caſe in *Harriſon* v. *Barnby*, 5 *T. R.* 246. It is true in that caſe the iſſue was that the ſaid rent, *nor any part thereof*, was in arrear. But where iſſue is taken on a collateral point it is ſufficient if the party join with his adverſary without adding any thing to it, as was ſaid by *Coke* in *Robſert* v. *Andrews*, *Cro. Eliz.* 82., who admitted that in an action of waſte for cutting twenty oaks, the Defendant ought to plead that he did not cut the ſaid twenty oaks, or any of them; but obſerved, that in debt upon an obligation that he ſhall do no waſte, and a breach aſſigned that he cut twenty oaks, it is ſufficient to plead that he did not cut the ſaid twenty oaks, *modo et formâ*, &c. Which inſtances ſhew the diſtinction, for in the latter caſe the iſſue reſpecting the twenty oaks is only collateral, whereas in the former caſe it is the direct iſſue between the parties. In *Dyer*, 115. *b.* the ſame diſtinction is taken, and

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though the judgment of the Court is not reported there, yet in *Co. Litt.* 282. *a.* the laſt caſe is ſtated with a reference to *Dyer*; and ſince Lord *Coke* adds, "judgment ſhall be given for the Plaintiff, for ſufficient matter of the iſſue is found for the Plaintiff," ſuch, it may be preſumed, was the judgment of the Court. Indeed in *White* v. *Bodinam*, 2 *Salk.* 629. in covenant by leſſee againſt leſſor, for that he entered upon him and ouſted him from the premiſes; the Defendant pleaded that he entered to diſtrain for rent, *abſque hoc* that he ouſted Plaintiff *de præmiſſis*; to which plea there was a demurrer, becauſe it omitted to allege "or any part thereof;" but the Court held the plea well enough, ſaying, if the Plaintiff will join iſſue upon the matter of the traverſe, and prove the ouſter of any part, the iſſue ſhall be for him. In that caſe, therefore, the Court gave effect to the diſtinction alluded to, even upon demurrer, whereas the objection in this caſe comes after verdict; at which period the Court may imply the words "or any part thereof," and thereby remove all poſſible doubt. Again, in *Waltham* v. *Sparkes*, 1 *Ld. Raym.* 41., in debt on an indemnity bond to a pariſh, and a plea of *non damnificatus*, the replication alleged that 2*s.* had been paid by the pariſh, and that 8*d.* of that ſum was for the maintenance of the pauper; and then the Defendant in his rejoinder traverſed that 8*d.* was for the maintenance of the pauper; on demurrer it was objected that the traverſe was too narrow, not having the words "or any part thereof," but the Court held it good enough. If a material allegation is traverſed in an improper or inartificial manner, the iſſue taken upon it is merely an informal one, and is aided after verdict. This appears from the opinion of Lord *Hale* in *Bennet* v. *Holbeck*, 2 *Saund.* 317. and *note* 6. to that caſe by Mr. Serjt. *Williams*. The Judge and jury in this caſe, therefore, had a right to ſever the material from the immaterial matter put in iſſue, and to find accordingly; and, having done ſo, the Court will not after verdict hold that to be one entire allegation which at the trial has been conſidered *diſtributivè*.

Williams Serjt. in ſupport of the rule. Many of the caſes cited do not apply to the preſent: and indeed it is very queſtionable whether at this day the caſe of *Robſert* v. *Andrews* can be ſuſtained as law. The queſtion here ariſes upon an avowry, which is in fact a declaration, both parties in replevin being actors, and either being at liberty to take down the record. This being ſo, the allegation

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that 120*l.* was not due is not a collateral but a direct iſſue. The addition of the words "or any part thereof" to the avowry in *Harriſon* v. *Barnby* completely diſtinguiſhes the two caſes: for though under general words the preciſe ſum may be proved, yet in this caſe there are no general words to admit of that proof. With reſpect to *Bennet* v. *Holbeck*, the day and place were made parcel of the iſſue; and therefore, though there was an informality in the plea which would have been bad upon demurrer, yet it was aided after verdict. The words "*de præmiſſis*" in *White* v. *Bodinam* include the whole and every part: it was not therefore neceſſary to enter into the queſtion reſpecting direct and collateral iſſues. Notwithſtanding the jury have in this caſe found a verdict for the avowant, yet the caſe is to be conſidered as if it came before the Court upon demurrer: for it was objected at the trial that the iſſues were not proved; and the verdict was only taken *pro formâ*, reſerving it for the opinion of the Court, whether it ought to have been ſo taken. The caſe of *Oſborn* v. *Rogers*, 1 *Saund.* 267. is a preciſe authority applicable to the preſent caſe. There, on *aſſumpſit* for ſervice from the 21ſt of *March* 1647 to the 1ſt of *November* 1664, the Defendant pleaded that the Plaintiff ſerved from the ſaid 21ſt of *March* to the 31ſt of *December* 1758, and then left the ſervice: and traverſed that he ſerved till the ſaid 1ſt of *November*, which traverſe was held bad, becauſe if the Plaintiff had taken iſſue upon it he would have been bound to prove the ſervice for the whole time or he could have recovered nothing; whereas if he had in fact ſerved for any part of the time he ought to recover *pro tanto*. So alſo in *Rex* v. *Kilderby*, 1 *Saund.* 311., which was an indictment for uſing the trade of a woollen-draper for three months not having ſerved an apprenticeſhip thereto, the Defendant traverſed the uſing of the trade for three months; and *Saunders*, at the end of the caſe obſerves, that the plea was bad on that ground, ſince it ought to have gone to every part of the time diſtributively: for if the Defendant had uſed the trade only one month, and the traverſe had been rightly taken, he ought to have been convicted. In *Goram* v. *Sweeting*, 2 *Saund.* 206., to *aſſumpſit* on a policy of inſurance for a loſs by perils of the ſea, the Defendant traverſed that the ſhip *and* tackle, *&c.* were loſt: to which there was a demurrer, the objection being that the traverſe ſhould have been in the diſjunctive, and of this opinion was the Court. In addition to

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the above cases may be cited *Colborne* v. *Stockdale*, 1 *Str.* 493., where to debt on bond conditioned for the payment of 1550*l.*, the Defendant having pleaded that part of the sum, *viz.* 1500*l.*, was won by gaming, and therefore the bond was void, the Plaintiff traversed that the 1500*l.* was won by gaming, which was held bad; for it was not necessary that so much should be won, but if any less sum for which the bond was given had been won by gaming the bond would be equally void. The same principle was adopted on demurrer in *Palmer* v. *Ekins*, 2 *Str.* 817. and *Brown* v. *Johnson*, 2 *Mod.* 145.

Lord ALVANLEY Ch. J. I do not see upon what principle it can be contended that those matters which are aided by the finding of the jury are to be considered as not found by the jury, because an objection was taken previous to the finding. The reason upon which such matters are considered as aided appears to me to be that the substance of the issue is found, and therefore any informalities in the issue shall not be regarded. The principal question in this case is, Whether the defect in these pleadings can be taken advantage of after verdict? There are many issues to which a party may demur if he think proper, and yet if he choose to go on to trial, he may, nevertheless, take advantage of the fault after verdict: as where an issue is completely immaterial; for no verdict can cure that defect. The issue in this case in form is, Whether 120*l.* be due or not? The Plaintiff having insisted upon that in his plea which is no answer to the avowry, namely, that 120*l.* is not due, and the avowant having joined issue upon that fact, it appears that 120*l.* is not due, but that a less sum is due, and we are to determine whether the Plaintiff shall be permitted to take advantage of his own bad pleading. If this had been an issue sent from the Court of Chancery to try whether 120*l.* were due or not, there must have been a verdict for the Defendant. In this case, however, where the substance of the issue is to ascertain whether any rent was in arrear, and the jury have found that 24*l.* were due, I see no reason, in the absence of any precedent precisely in point, why the avowant should be precluded from having the benefit of that finding. The objection is on the record, and may be moved again either in arrest of judgment or upon a writ of error.

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ROOKE J. (a). The cases cited by my Brother *Bayley* have satisfied me that the verdict, as found, may be supported. If the Plaintiff be dissatisfied with our opinion, the point, being on the record, will be open to him in another court.

CHAMBRE J. If the argument of my Brother *Williams* were to prevail, we ought to grant a repleader; for in that case the real question between the parties would not have been decided by the finding of the jury. This defect, however, appears to me to be aided by the statute of jeofails, for the substance of the issue is rightly found.

Rule discharged.

(a) *Heath* J. was absent.

END OF HILARY TERM.

CASES

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IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

AND

In the HOUSE of LORDS,

IN

Eaſter Term,

In the Forty-third Year of the Reign of GEORGE III.

(IN THE HOUSE OF LORDS.)

April 16th. **The Inhabitants of the County of CUMBERLAND *v.* Our Sovereign Lord the KING, in Error.**

The 1 *Anne*, *c.* 18. *ſ.* 5. has not taken away from the crown the power of removing by *certiorari* an indictment for not repairing a county bridge.

THE record in this caſe ſtated, that at the general ſeſſions of oyer and terminer of our lord the king, held at *Carliſle*, in and for the county of *Cumberland*, on the 26th of *Auguſt*, 31ſt *George* the Third, an indictment was preferred and found, wherein it was preſented as follows; that is to ſay, The jurors for

Quære, Whether the ſame perſons who are bound to repair a bridge are alſo bound to widen it, if the exigencies of the public ſhould require?

our

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our lord the king, upon their oath, preſent that there is a certain common public bridge called *Blennerhaſſet-bridge*, ſituate upon the river *Ellen*, at the pariſh of *Torpenhow* in the ſaid county of *Cumberland*, in the king's common highway, leading from the village of *Aſpatria* in the county of *Cumberland*, towards and unto the market town of *Ireby* in the ſaid county, uſed for all the liege ſubjects of our ſaid lord the now king and his predeceſſors by themſelves, and with their horſes, coaches, carts, and carriages, to go, return, paſs, ride, and travel upon, and over, at their will and pleaſure, freely and ſafely, without any obſtruction, hindrance, or impediment whatſoever; and that the ſaid common public bridge on the 20th day of *Auguſt*, in the 31ſt year of the reign of our ſovereign lord *George* the Third, king of *Great Britain*, and ſo forth, and continually afterwards until the day of the taking of this inquiſition, was, and yet is broken, ruinous, and in decay, for want of due reparation and amendment of the ſame; and the ſaid common public bridge, during all the time laſt mentioned, was, and yet is *over narrow*, and the battlements of the ſame bridge were not, nor yet are of a *ſufficient height* to guard and preſerve the ſaid ſubjects of our ſaid lord the king, paſſing, riding, and travelling upon and over the ſaid bridge from going and falling over the ſaid battlements into the ſaid river *Ellen*, by reaſon whereof the ſaid liege ſubjects of our ſaid lord the king, neceſſarily going, returning, paſſing, riding, and travelling upon and over the ſaid common public bridge, by themſelves and with their horſes, coaches, carts, and carriages, during all the time laſt mentioned, could not, nor yet can go, return, paſs, ride, and travel upon and over the ſaid common public bridge ſo freely and ſafely as they ought to do; but were, and yet are greatly obſtructed, ſtopped, and hindered, in the going, returning, paſſing, riding, and travelling upon and over the ſame common public bridge, and during all the time aforeſaid were, and yet are in great peril, hazard, and danger of going, riding, and falling over the ſaid battlements of the ſaid common public bridge into the ſaid river *Ellen*, and of being there ſuffocated, drowned, and killed in the ſame, and of loſing and ſpoiling their goods and wares, to the great damage and common nuiſance of all the liege ſubjects of our ſaid lord the king, upon and over the ſaid common public bridge, going, returning, paſſing, riding, and travelling, againſt the form of the

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ſtatutes in that caſe made and provided, and againſt the peace of our ſaid lord the king, his crown and dignity, and that the inhabitants of the county of *Cumberland* of right ought to repair and amend the ſaid common public bridge, ſo as aforeſaid being broken, ruinous, *over narrow*, and in decay, and the battlements thereof not being of *a ſufficient height*, and to make the ſame ſafe and ſecure for the ſaid ſubjects, whenever and as often as it becomes neceſſary.

Which ſaid indictment our ſaid lord the king afterwards, for certain reaſons, cauſed to be brought before him, to be determined according to the law and cuſtom of *England*, and two of the inhabitants of the ſaid county having appeared and pleaded thereto the general iſſue, and put themſelves upon the country, and the king's coroner and attorney having done the like, and iſſue being joined, the ſaid indictment came on to be tried at the aſſizes held at the city of *Carliſle* on the tenth day of *Auguſt* 1792, before *Thompſon* B., by a jury of the county of *Cumberland*, when the Plaintiffs in error were found guilty of the premiſes charged upon them by the ſaid indictment, in manner and form as by the ſaid indictment was alleged. Whereupon in *Trinity* Term 1795 (*a*), the Court gave judgment, and adjudged that the Plaintiffs in error for the treſpaſſes, contempts, and nuiſances whereof they were indicted and convicted as aforeſaid, ſhould pay a fine of three hundred and fifty pounds, and that the ſaid fine ſhould be levied and paid into the hands of the treaſurer of the ſaid county, to be applied purſuant to the direction of the ſtatute in ſuch caſe made and provided.

On this judgment the plaintiffs brought a writ of error, and aſſigned the following errors: 1ſt, That by the record aforeſaid it appeared that the ſaid inhabitants of the ſaid county of *Cumberland* were indicted and convicted, not only for that the ſaid common public bridge in the ſaid indictment mentioned, was broken, ruinous, and in decay, for want of due reparation and amendment of the ſame, but alſo for that the ſaid common public bridge was over narrow, and the battlements of the ſame bridge were not of a ſufficient height to guard and preſerve the ſubjects of our ſaid lord the king, paſſing, riding, and travelling upon and over the ſaid bridge, from going and falling over the ſaid battlements into

(*a*) See the caſe reported, 6 T. R. 191.

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the ſaid river *Ellen*, although no obligation was, or is laid or charged upon the ſaid inhabitants of the ſaid county of *Cumberland* in or by the ſaid indictment, nor are they by law bound to widen the ſaid bridge, or to raiſe or heighten the battlements thereof. 2d, That by the record aforeſaid it appears that our ſaid lord the king, for certain reaſons, cauſed the ſaid indictment to be brought before him to be determined, and that the ſame was accordingly determined in and by the ſaid court of our ſaid lord the king, before the king himſelf, although by law, and according to the form of the ſtatute (*a*) in ſuch caſe made and provided, the ſaid indictment ought not to have been removed out of the ſaid county of *Cumberland* into the ſaid court of our ſaid lord the king, before the king himſelf, but ought to have been determined in the ſaid county of *Cumberland*, and not elſewhere. 3d, For that the judgment aforeſaid, in form aforeſaid given, appears to have been given for our ſaid lord the king againſt the ſaid inhabitants of the ſaid county of *Cumberland*; whereas by the law of the land the ſaid judgment ought to have been given for the ſaid inhabitants of the ſaid county of *Cumberland*, and they ought to have been acquitted of the premiſes in the ſaid indictment mentioned.

The king's coroner and attorney thereupon rejoined that there was no error in the ſaid indictment and record, which the plaintiffs inſiſted that there was, and humbly hoped that the judgment of the Court of King's Bench would be reverſed for the following amongſt other reaſons:

1ſt, Becauſe the judgment given for ſo large a fine as three hundred and fifty pounds was given, not for the purpoſe of being laid out in or towards repairing the bridge according to its ancient immemorial limits, form, and conſtruction, for that would not have required more than five pounds, but for the purpoſe of entirely pulling down the old bridge and making a new one wider than the preſent one, upon a ſuppoſition that the preſent bridge was too narrow for the public convenience, and upon this principle, that perſons bound to the repair of public bridges are by

(*a*) 1 *Anne*, *c.* 18. *ſ.* 5. which provides "that all matters concerning the repairing and mending of the bridges and highways hereinbefore mentioned, ſhall be determined in the county where they lie and not elſewhere; and that no preſentment or indictment for not repairing ſuch bridges, or the highways at the end of ſuch bridges, ſhall be removed by *certiorari* out of the ſaid county into any other court."

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law bound to make new bridges larger and wider than the old ones, if the convenience of the public ſhould call for it. This principle is new, and, it is ſubmitted, is not warranted by law; the legal obligation is only to repair and amend the exiſting bridge from time to time as occaſion may require, not to enlarge or widen it from time to time as the public convenience may require. Such an extenſion of the obligation would be extremely burthenſome and oppreſſive upon perſons bound to the repairs of bridges, and particularly to individuals who may be bound by reaſon of the tenure of lands to repair public bridges, and the law muſt operate equally upon them as inhabitants of a county or diſtrict. The law having furniſhed no means by which perſons bound to the repair of bridges are enabled to acquire land to widen ſuch bridges upon, and the acts of the legiſlature in many inſtances, for rebuilding bridges upon more commodious conſtructions for the public, and in conſideration thereof authoriſing tolls to be taken, are ſtrong proofs to ſhew that the obligation impoſed by law in this caſe does not go to the extent upon which the Court of King's Bench have proceeded in giving the ſaid judgment.

2d, The ſtatute 1 *Ann. ſtat.* 1. *c.* 18. *ſ.* 5. expreſsly enacts, that all matters concerning the repairing and amending of bridges and highways ſhall be determined in the court where they lie and not elſewhere, and that no preſentment or indictment for not repairing bridges, or highways at the ends of bridges, ſhall be removed by *certiorari* out of the ſaid county into any other court. The prohibition of removal is general and without any diſtinction, whether the *certiorari* is ſued out at the inſtance of the proſecutor or the defendants; and therefore the removal of the preſent indictment is contrary to the ſtatute, let it be ſued out at whoſe inſtance it might; but it does not even appear by the record at whoſe inſtance it was ſued out. There was no purpoſe of public utility to be anſwered by the removal, becauſe it was ſent down to be tried in the county of *Cumberland*, and appears by the record to have been tried by a jury of that county. If that was wrong, it is another ground of error appearing on the record, though not ſpecially aſſigned.

T. Erſkine.
G. Wood.

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The king's coroner and attorney hoped that the judgment would be affirmed for the following amongſt other reaſons:

1ſt, The obligation upon the inhabitants of a county to repair public bridges is an obligation of common right founded on public neceſſity and convenience. It is eſſential to the performance of it that there ſhould be no obſtruction to the paſſage of the king's ſubjects, where the right of paſſage extends to carriages; the bridges muſt neceſſarily be ſufficient for ſuch carriages as the public have a right to travel with, and are in common uſe; and it would be againſt principles of public policy, and be a reſtraint to commerce and agriculture, if the uſe of improved modes of conveying goods and merchandize could not be adopted upon the public high roads of the kingdom. It is alſo eſſential to the performance of the obligation that the king's ſubjects may paſs with ſafety as well to their perſons as their goods, and the danger in theſe reſpects to thoſe who have occaſion to uſe the right of paſſage is the common averment in all indictments of highways and bridges. The obligation to repair is not confined in all caſes to the preciſe limits of the exiſting bridge. The public exigency, and the free and ſecure paſſage is at all events to be provided for, and if the water changes its courſe the bridge muſt be accommodated to that change.

2d, The objection to the removal of the record by *certiorari* reſts ſolely on the generality of expreſſion in a clauſe in the ſtat. 1 *Ann. ſtat.* 1. *c.* 18. *ſ.* 5. but in very many inſtances the crown is not bound by general words in an act of parliament, and eſpecially where no particular intent appears that it ſhould be ſo bound. It would be againſt the plain intent of the ſtatute ſo to conſtrue the language of this clauſe, the manifeſt object of which is to prevent defendants from obſtructing juſtice by unneceſſary delay and expence, and not to reſtrain the diſcretion of the mode of proſecution. In the particular inſtance of ſtatutes taking away the right of removing indictments by *certiorari* it is laid down as a general rule, that the crown is not bound by general words; and the ſtatute upon which the preſent queſtion depends has been ſo conſtrued by the uniform courſe of practice, commencing almoſt immediately after the paſſing of the act, and continued to the preſent times, as appears by a great number of precedents referred to in the report

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of a decision of the Court of King's Bench upon this point in this prosecution. There is no judicial precedent to the contrary.

Edward Law.
A. Chambre.

On this day *Erskine* and *Wood* were heard at the bar of the House for the Plaintiffs in error (*a*).

The Lord Chancellor (*b*) then put two questions to the Judges; 1st, Whether upon this record the House could enter into the general question whether the county was bound to widen bridges according as the public exigency or change of circumstances might require; or whether after a general verdict it must not be presumed that the over-narrowness mentioned in the indictment arose from the bridge by some cause or other having been contracted from its ancient width? And his Lordship observed, that if the Judges should think so, it would be unnecessary to hear any further argument as to the general question which would remain undecided, and as to which, he added, he entertained considerable doubts. 2d, Whether the *certiorari* was taken away by the general words of the statute? And his Lordship intimated his own opinion that it was the prerogative of the king to issue his *certiorari*; and that the general words of the statute had not taken away the *certiorari* at the instance of the crown, but only that which issued at the instance of the party.

MACDONALD Ch. B. delivered the opinion of the Judges present (*c*), first that upon this record the general question was excluded, since it must be presumed after verdict that the over-narrowness of the bridge had been occasioned either from some addition having been made to the inside of the battlements or from some other cause, by which the ancient width of the bridge had been contracted; and secondly, that the *certiorari* was not taken away by the general words of the statute.

Accordingly the judgment of the Court of King's Bench was affirmed.

(*a*) *Garrow* and *Holroyd* were to have argued *e contrà*.

(*b*) Lord *Eldon*.

(*c*) *Hotham* B., *Heath* J., *Thompson* B., *Rooke* J., and *Graham* B.

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JENNINGS Demandant, STREET Tenant, and MARY VERNON, WILLIAM CROSS and ELEANOR his Wife, and GRACE JENNINGS VERNON, Vouchees. *April* 28th.

If the different vouchees in a recovery execute and acknowledge several warrants of attorney, though upon the same piece of parchment, the Court will not suffer the recovery to pass.

IN this case *Mary Vernon* and the other vouchees residing at a considerable distance from each other, and two captions therefore being necessary, two separate warrants of attorney upon the same piece of parchment, with a caption at the foot of each, were taken, one from *Mary Vernon*, and the other from the remaining vouchees.

It being objected by the officers, that as the voucher was to be joint, one warrant of attorney with two captions should have been taken,

Best Serjt., in order to amend this error, now moved that the names of *William Cross* and *Eleanor* his wife, and *Grace Jennings Vernon* might be inserted immediately after the name of *Mary Vernon* in the first warrant of attorney, and that the other warrant might be struck out, and both the captions be considered as relating to the amended warrant of attorney. He observed that if the Court should find any difficulty in allowing the amendment proposed, still they might suffer the recovery to pass in its present shape, the objection being merely formal; for that the two warrants of attorney upon the same piece of parchment in substance amounted to a joint warrant of attorney by all the parties.

But *The Court* were clearly of opinion that they could not make the proposed amendment, and also that the recovery could not pass in its present shape, for that notwithstanding all the vouchees had appointed the same attorney, yet that it did not follow from thence but that he might be appointed by the different parties for separate purposes.

Best took nothing by his motion (*a*).

(*a*) See *Balch v. Phelps*, *post*, p. 365.

April 29th.

THORNTON v. MERREDEW.

Where the Defendant ſuffers judgment by default in an action of debt on ſimple contract, the Plaintiff is not entitled to levy the expences of the execution, notwithſtanding thoſe expences, together with the debt and coſts of the action, do not exceed the ſum confeſſed upon record.

JUDGMENT by default having been ſuffered in an action of debt on ſimple contract, the plaintiff took out execution, and levied not only for the debt and coſts, but alſo for the expences of the execution.

Cockell Serjt. having obtained a rule calling on the Plaintiff to ſhew cauſe why the coſts of the execution ſhould not be reſtored to the Defendant,

Marſhall Serjt. ſhewed cauſe, and contended that as the Defendant had confeſſed the whole ſum mentioned in the declaration, by ſuffering judgment to go by default, the Plaintiff was entitled to levy not only for the debt and coſts of the action, but alſo for the coſts of the execution, provided the whole amount did not exceed the ſum ſtated in the declaration and confeſſed upon record. He urged that in debt on bond with a penalty the coſts of the execution are always taken, and that the debt on record in the preſent caſe might be conſidered in the ſame light as the penalty of the bond, the larger ſum in both caſes ſtanding as a ſecurity for all that is *bonâ fide* due.

But *The Court*, after referring to the officers, were clearly of opinion that in debt on ſimple contract the Plaintiff was not entitled to the coſts of the execution.

Rule abſolute.

April 29th.

PHILLIPS Demandant *v.* JONES and Others Deforciants.

If one of the deeds to lead the uſes of a fine, *viz.* the leaſe, contain the word "tithes," but the other deed, *viz.* the releaſe, omit that word, the Court will not amend the writ of entry by inſerting the word "tithes," though the releaſe has the words, "and alſo all houſes, ways, *&c.* hereditaments and appurtenances whatſoever, to the ſaid meſſuages, lands, *&c.* belonging or in any way appertaining."

Williams Serjt. moved to amend the writ of entry in a fine by inſerting the word "tithes." To warrant this amendment he produced the deeds to lead the uſes, which were a leaſe and releaſe, in the former of which the word "tithes" was mentioned, but in the latter, after the deſcription of the lands were theſe words only, "and alſo all houſes, ways, *&c.* hereditaments and appurtenances whatſoever, to the ſaid meſſuages, lands, *&c.* belonging or in any way appertaining." He referred to the caſe of *Dowſe*

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PRITTIE and JONES and Others.

v. *Reeve*, *ante*, vol. 2. p. 578. where a ſimilar amendment was allowed upon the ground of the word "hereditaments" being uſed in the deed to lead the uſes.

But *The Court* obſerved that the releaſe did not convey all the hereditaments deſcribed in the leaſe, but only the hereditaments belonging to the meſſuages and lands before deſcribed in the releaſe itſelf, and that tithes were not hereditaments belonging to land, but were a ſeparate ſubject of tenure, and muſt be held by a different title.

Williams took nothing by his motion.

CLARK and Others, Executors of MOLES, *v.* DEVLIN. *May* 2d.

If the holder of a bill of exchange, of which payment has been refuſed, inform the drawer of his intention to take ſecurity from the acceptor, and the drawer anſwer, that he may do as he likes, for that he (the drawer) is diſcharged for want of notice, and it appear that due notice had been given; the holder may ſue the drawer notwithſtanding that he has taken ſecurity from the acceptor, for the drawer under ſuch circumſtances muſt be conſidered as having aſſented to the ſecurity being taken.

THIS was an action upon a promiſſory note and two bills of exchange made and drawn by the Defendant in favour of *Moles* the Plaintiffs' teſtator.

The cauſe was tried before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after laſt *Michaelmas* Term, when it was inſiſted for the Defendant, that part of the Plaintiffs' demand, to the amount of 40*l.* had been diſcharged by a bill of exchange for that ſum given by the Defendant to *Moles*. The facts reſpecting this laſt-mentioned bill were as follows; it was drawn by the Defendant upon one *Atkinſon*, payable to the Defendant's own order, and accepted by *Atkinſon*, payable at the Defendant's houſe; the Defendant indorſed it to *Moles* and put it into his hands; *Moles* indorſed it to one *Newcomb*. When the bill became due it was preſented at the Defendant's houſe for payment, which was refuſed; on the next day *Newcomb* gave notice to the Defendant of the non-payment, who thereupon deſired him to take out a writ againſt *Atkinſon*, ſaying, that if *Newcomb* would deliver the writ to him he would get *Atkinſon* arreſted. *Atkinſon* having been accordingly arreſted, and having lain ſome time in gaol, offered *Newcomb* to give him a warrant of attorney for the amount, payable by inſtalments. Upon this *Newcomb* told the Defendant that it was in vain to keep *Atkinſon* any longer in gaol, and that he ſhould take the warrant of attorney; to which the Defendant anſwered, "you may do as you like, for I have had no notice of the non-payment:" *Newcomb* replied, "how can you ſay ſo when you arreſted *Atkinſon* yourſelf?" *Newcomb* having accordingly taken the warrant of

attorney

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attorney and let *Atkinſon* out of gaol, it was contended that he had thereby diſcharged *Moles* the previous indorſer as well as the drawer, and conſequently the bill indorſed by the Defendant to *Moles*, which he had indorſed over for value, muſt be deemed a payment to the amount of 40*l.* A verdict was taken for the Plaintiffs, ſubject to the opinion of the Court, Whether, under the circumſtances of the caſe, the bill for 40*l.* was to be conſidered as part payment of the debt declared upon?

Accordingly a rule *niſi* having been obtained in the courſe of laſt term for reducing the verdict,

Shepherd and *Bolt* Serjts. now ſhewed cauſe. The queſtion is, Whether the indorſees could have maintained an action againſt the Defendant upon the bill for 40*l.*? for if they were entitled to maintain ſuch action the Defendant had no right to conſider it as part payment of the Plaintiffs' demand. It may be admitted that giving time to the acceptor will, generally ſpeaking, diſcharge the drawer; but it does not do ſo in all caſes. If the holder, after having given time to the acceptor, ſue the drawer, the latter will be entitled to ſue the acceptor, notwithſtanding the agreement with the holder; it would therefore be a breach of faith in the holder to ſue the drawer after ſuch an agreement. This was the ground upon which the caſe of *Engliſh* v. *Darley*, *ante*, vol. 2. p. 61. proceeded. But if the drawer having notice of the holder's intention to give time to the acceptor, conſent to his ſo doing, he will ſtill remain liable, ſince it will not be competent to him to ſue the acceptor within the time given to him. In this caſe the converſation between *Newcomb* and the Defendant amounted to a conſent on the part of the latter, that the former ſhould take a warrant of attorney from the acceptor payable by inſtalments; for when *Newcomb* mentioned his intention of ſo doing he did not object, but told him that he might do as he liked, and though he added that he was diſcharged by want of notice, that was not true, ſince full notice had been given to him.

Cockell and *Bayley* Serjts. in ſupport of the rule. The general principle of law is, that if the holder give time to the acceptor without the conſent of the intermediate parties, they are thereby diſcharged. This was clearly laid down in *Tindall* v. *Brown*, 1 *T. R.* 167. and *Walwyn* v. *St. Quintin*, *ante*, vol. 1. p. 652. and the caſe of *Engliſh* v. *Darley* proceeded on the ſame ground. In

this case however it is said that the drawer assented to the conduct of the holder in giving time to the acceptor, but that is not the fair import of the conversation between the drawer and the holder. When the Defendant said that *Newcomb* might do as he liked, it was saying that he must act at his peril, and though he added that he was discharged for a reason which was not true, that can make no difference, for he was not bound to disclose the grounds of his defence; he gave no consent, but left *Newcomb* to take his own course as he might be advised. *Newcomb* having thought proper to give time to the acceptor, the Defendant has a right to take advantage of that circumstance.

Lord ALVANLEY Ch. J. It appears to me that a sufficient defence has not been established with respect to this 40 *l.* and that the conduct of the Defendant amounted to a tacit consent that *Newcomb* should give time to the acceptor. If the holder of a bill, without the knowledge of the other parties, give time to the acceptor, he cannot afterwards call on the other parties without an injury to the person to whom he has given time. In such case, therefore, those parties will be discharged. But a man is not bound to seek his remedy against the acceptor; if he sign judgment against him he will not be bound to prosecute that judgment; but he must take care that he does not give the acceptor a defence against the drawer. In this case the Defendant had complete knowledge of the non-payment of the bill, and of the holder's intention to take a warrant of attorney payable by instalments; yet upon this latter circumstance being mentioned to him, he does not say if you give time to the acceptor I will have nothing more to do with it, but he suffers him to go away without making any objection. Such conduct amounts to a tacit consent to the intended agreement between the holder and the acceptor.

ROOKE J. (*a*). I am of the same opinion. I agree to the general principle, that if the holder does any thing by which the drawer is injured, he ought not to be allowed to sue the drawer. But in this case the holder informed the drawer of his intention to take a warrant of attorney from the acceptor, which I think was equivalent to asking if the drawer had any objection to his so doing. In fact the drawer made no objection, but told the holder he might do as he pleased, saying that he was discharged for want

(*a*) Mr. Justice *Heath* was absent.

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of notice. This case stands entirely upon its own circumstances, and turns upon the construction which ought to be put upon the conversation between these two persons. I think it amounted to an assent on the part of the drawer, that the holder should take the warrant of attorney from the acceptor.

CHAMBRE J. The acceptor of a bill is to be considered as the principal debtor, and the other parties as sureties only; the holder therefore, who is the creditor, ought not so to negotiate with the acceptor as to prejudice the remaining parties to the bill. On this ground the case of *English* v. *Darley* proceeded. If a creditor give time to the principal debtor, the collateral securities are discharged both in law and equity. But in this case the Defendant having assented to the payment by instalments, cannot now complain of being prejudiced by the conduct of the holder.

Rule discharged.

May 5th.

BALCH *v.* PHELPS.

If under a *dedimus potestatem* to take the acknowledgment of nine persons in a fine, the commissioners take the acknowledgment of six on one piece of parchment, and of three on another, the Court will not allow the fine to pass.

PRAED Serjt. moved that a fine might pass notwithstanding an objection arising out of the following circumstances: A *dedimus potestatem* had been directed to commissioners to take the acknowledgment of nine persons. The commissioners took the acknowledgments of six out of the nine persons on one piece of parchment, and of the remaining three upon another piece of parchment; which mode of taking the acknowledgments was objected to by the officers. In support of his application he cited an anonymous case in *Cro. Eliz.* 576. and also produced an affidavit of all the parties, stating that they wished the fine to pass.

Lord ALVANLEY Ch. J. The objection is that there is no agreement by the parties to levy a fine jointly. Each party when he signs the acknowledgment reads the instrument, and agrees to keep his covenant together with such persons as acknowledge by means of the same instrument. Each of the parties therefore to the acknowledgment of the three, acknowledged that he was ready to keep his covenant together with two others, but not together with eight others. With respect to the case in *Cro. Eliz.* where the *dedimus* was to take the acknowledgment of four, and three only acknowledged, I am not sure that if three persons mean to

join with a fourth in acknowledging a fine, and the fourth refuse, that the acknowledgment of the three first ought thereby to be vitiated. 1803. BALCH v. PHELPS.

HEATH J. These separate acknowledgments will not warrant a joint judgment.

Praed took nothing by his motion (*a*).

(*a*) *Vide Jennings v. Vernon, ante*, p. 361.

TAPP and Another *v.* LEE.

May 11th.

In an action on the case for giving a false character to a tradesman, whereby he was induced to trust an insolvent person, the Court held that fraud was necessary to support the action: but set aside a verdict for the Plaintiff on payment of costs, though there were some circumstances in the case from which fraud might be inferred, on a suspicion that the inquiry was made of the Defendant with a view to entrap him, and thereby obtain his guarrantee for payment of the debt contracted by the insolvent.

THIS was an action on the case. The declaration stated that the Plaintiffs were linen-drapers, and that one *Tho. Brunell* was desirous of purchasing goods of them to the amount of 28 *l.* 4 *s.* 9 *d.* but they were unwilling to trust him with the said goods without being satisfied of his character and ability to pay for the same; and thereupon by one *James Abrahams* their servant they applied to the Defendant, with whom the said *T. B.* had before then dealt in the way of his the Defendant's business of a linen-draper, for the character of the said *T. B.* and his ability to pay for the said goods; nevertheless the Defendant well knowing the premises, but fraudulently intending to deceive and injure the Plaintiffs in their aforesaid trade and business, and to induce them to give credit to the said *T. B.* for the said goods falsely, fraudulently, and deceitfully represented, asserted, and affirmed to the said *J. A.* so being the servant of the Plaintiffs as aforesaid, of and concerning the said *T. B.* that he the said Defendant believed him the said *T. B.* to be an honest man; that he the said *T. B.* owed him the said Defendant money, and that the said Defendant was willing to trust him the said *T. B.* more; by means whereof, the Plaintiffs not knowing the contrary, but believing the same to be true, sold goods upon credit to the said *T. B.* to the amount of 28 *l.* 4 *s.* 9 *d.*; that the Defendant at the time of making such representation did not believe the said *T. B.* to be an honest man, and that in truth and in fact the said *T. B.* was then an uncertificated bankrupt, and in bad and insolvent circumstances, as the said Defendant well knew, and that the Defendant was not willing to trust the said *T. B.* more than the sum which the said *T. B.* then owed him; but on the contrary thereof had before then refused to

trust

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truſt him the ſaid *T. B.* any longer, and that the ſaid ſum of 28*l.* 4*s.* 9*d.* was ſtill due and unpaid, and the Plaintiffs by means of the premiſes were likely to loſe the ſame. Plea, not guilty.

At the trial before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after laſt *Hilary* Term, it appeared that *T. Brunell* having had goods of the Plaintiffs at three different times to the amount of 28*l.*, applied to them for more to the amount of 28*l.* 4*s.* 9*d.*, who refuſed to truſt him further without an inquiry into his character and circumſtances, and accordingly ſent *J. Abrahams*, their ſervant, to make inquiries of the Defendant, with whom *Brunell* had before dealt; that *Abrahams* having ſtated to the Defendant the above facts and the cauſe of his coming, the Defendant made the repreſentation alleged in the declaration, upon which the Plaintiffs gave *Brunell* credit for the goods; that ſhortly after this the Defendant inquired of *Abrahams* if the Plaintiffs had truſted *Brunell*, to which *Abrahams* anſwered, "after what you ſaid we could do no otherwiſe;" upon which the Defendant replied, "I did not think you was ſuch a cake;" that *Brunell*, previous to the repreſentation, had dealt with the Defendant for goods upon ſale or return, and owed him money, and that the Defendant had in the laſt inſtance of an application for more goods refuſed to let him have any others than thoſe already ſelected for him, amounting to about 10*l.* becauſe *Brunell* had not complied with a requeſt of the Defendant to permit him to inſpect his books and look into the ſtate of his affairs; which requeſt had been made in conſequence of a report of writs being out againſt him; that the Defendant knew that *Brunell* had been a bankrupt, that he had not obtained his certificate, and that he was inſolvent. The jury found a verdict for the Plaintiffs.

A rule *niſi* for ſetting aſide this verdict having been obtained on a former day,

Shepherd Serjt. now ſhewed cauſe. The queſtion for the deciſion of the jury was, Whether at the time when the repreſentation was made the Defendant fairly diſcloſed the circumſtances within his knowledge? It has been determined, both in *Paſley* v. *Freeman*, 3 *T. R.* 51. and *Eyre* v. *Dunsford*, 1 *Eaſt.* 318., that it is not neceſſary to maintain an action of this ſort that the Defendant ſhould have any intereſt in deceiving the Plaintiff. If the truth be miſrepreſented, or any material fact be ſuppreſſed whereby the Plaintiff is injured, this action is maintainable, though the miſrepre-

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ſentation or ſuppreſſion be not aſſignable to fraudulent views of intereſt in the Defendant. In the preſent caſe the Defendant not only ſtated that *Brunell* owed him money, but that he was willing to truſt him with more, from which the Plaintiff muſt have been induced to believe that the Defendant conſidered him as a ſolvent man, whereas he knew at the time that a commiſſion of bankruptcy had been taken out againſt him, and that he was inſolvent, and moreover he had refuſed to truſt him with goods beyond the amount of 10*l.* Indeed the ſubſequent expreſſion of the Defendant, that he did not think the Plaintiff's ſervant had been ſuch a cake, afforded ſtrong evidence of fraud.

Beſt Serjt. in ſupport of the rule. The caſes of *Paſley* v. *Freeman* and *Eyre* v. *Dunsford* decide nothing more than that if a man deliberately ſtate what he knows to be falſe he is liable to an action, but they have not decided that if he directly ſtate what is true, and omit to communicate ſomething more within his knowledge, he is on that account reſponſible. The expreſſion of the Defendant, that he did not think the Plaintiff's ſervant had been ſuch a cake, clearly ſhews his conſciouſneſs that he had not given ſuch a character to *Brunell* as ſhould have induced the Plaintiffs to truſt him. Saying that he was an honeſt man amounted to no repreſentation that he was a reſponſible man, and the aſſertion that he had truſted him and would truſt him more, was true in part, inaſmuch as he had truſted him, and was not negatived as to the remaining part by proof of his having refuſed to truſt him after that period. It appears that previous to the inquiry being made of the Defendant, the Plaintiff had dealt with *Brunell*, and the object of inquiry ſeems to have been to obtain a guaranty from the Defendant, by inducing him to make ſome repreſentation of *Brunell* which ſhould render the Defendant liable to an action. Such an attempt, if ſanctioned by the Court, will completely defeat the proviſions of the ſtatute of frauds. The caſe of *Haycraft* v. *Creaſy*, 2 *Eaſt*, 92. was much ſtronger than this, for the Defendant there poſitively aſſerted that *E. F. Robinſon* was a perſon who might be truſted with ſafety; yet the majority of the Judges in the Court of King's Bench held that as the aſſertion, though falſe, was made without fraud, the Defendant was not liable to an action.

Lord ALVANLEY Ch. J. I have great doubts whether this can be deemed a verdict againſt evidence, though perhaps I ſhould not

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have concurred in finding such a verdict myself; for it cannot be said that there was not evidence to be left to a jury of fraud in the Defendant. On this species of action my mind is made up. After the determinations which have taken place, I am bound to hold that such an action lies, though I much wish that the legislature would interfere in restraining these actions, unless the representation on which they are made be given in writing. The Judges have determined that if a man fraudulently and with intention to deceive make a representation by which he causes credit to be given to another, an action arises *ex delicto*. Lord *Kenyon* indeed went further; he did not think the proof of fraud necessary, but was of opinion that if a man made an assertion without sufficient ground, whereby another was injured, he rendered himself liable to an action. If a man say, "If you trust *A*. I will pay you;" he is not liable upon the credit which he has obtained for *A*.; yet if he say that *A*. is a good man, he is held liable for the credit which by that assertion he obtains for *A*. In such case, however, if we are bound to hold him liable, we ought to require satisfactory evidence that the character was given with an intention to deceive. In stating my opinion to the jury on the evidence in this case, I told them that unless they believed that the party knew the representation to be false at the time when he made it, and intended thereby to obtain credit for *Brunell*, they ought not to find a verdict for the Plaintiff; and I pointed out to them the circumstances from which it appeared probable that the inquiry made by the Plaintiffs was intended as a trap. Certainly the Defendant has no reason to complain of my direction, and though I doubt whether the jury have drawn a right conclusion, yet I think it cannot be called a verdict against evidence. We should therefore invade the province of a jury too much if we were to grant a new trial in this case without payment of costs; but as there are circumstances of suspicion in the case, I think on payment of costs there ought to be a further inquiry.

HEATH J. I think that my Lord laid down the law correctly to the jury. The evidence of fraud turned on the single expression of the Defendant, that he did not think the Plaintiff's servant had been such a cake; the effect of which was to be decided upon by them. If he meant to say that he did not think the Plaintiff's servant would have been such a dupe, it should seem as if he meant

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to exult in the calamity into which he had led his fellow-tradeſman. In ſaying that he had truſted him, and would truſt him again, he might poſſibly intend that declaration to be accompanied with a reſervation of his paying what he had already truſted him. Certainly this is not an action to be favoured; but if a new trial is granted it muſt be on payment of coſts.

ROOKE J. The importance of the queſtion involved in this kind of caſe makes it fit to be reconſidered. It appears to me indeed that there is reaſon to ſuſpect the Plaintiffs intended to practiſe a trick on the Defendant, and therefore I have no objection to a new trial being granted on payment of coſts.

CHAMBRE J. Caſes of this ſort are within all the miſchief intended to be prevented by the ſtatute of frauds; but I think that ſtatute does not extend to them. I much wiſh indeed that it did, not only on account of the extenſive conſequences to thoſe againſt whom ſuch actions are brought, but in reſpect of the evidence to be produced at the trial. It is very deſirable that repreſentations of character, by which parties are made liable, as well as engagements for the debts of third perſons, ſhould be in writing; but that is not the law. The action itſelf is modern in practice, but had there been no deciſion on the ſubject, I ſhould ſtill think it founded on ſolid legal principles. It would be an abſurdity in law to hold that if a man draws another into a ſnare, the party ſuffering ſhould have no remedy by action. An action on the caſe for deceit is an action well known to the law, and I cannot agree in the argument which has been uſed for the Defendant, that ſuch actions ought to be confined to repreſentations which are literally falſe. Fraud may conſiſt as well in the ſuppreſſion of what is true, as in the repreſentation of what is falſe. If a man, profeſſing to anſwer a queſtion, ſelect thoſe facts only which are likely to give a credit to the perſon of whom he ſpeaks, and keep back the reſt, he is a more artful knave than he who tells a direct falſehood. As to the caſe of *Haycraft* v. *Creaſy*, I agree with the majority of the Judges who decided the point of law. In that caſe there was no fraud; but fraud is the foundation of the action. There the Defendant himſelf was miſled; every thing which he ſtated he believed; the ground of action therefore totally failed. Conſidering the circumſtances which attended the preſent caſe, I think it proper that it ſhould be tried again, but it muſt be upon payment of coſts. The

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jury were not misdirected in point of law; the fact left to their consideration was the fraud, and I think that there was evidence upon which fraud might have been found. Did the Defendant tell the whole truth upon those points which he could not but know to be material to the object of the Plaintiff's inquiry? I do not think that he did, even if every fact which he stated was literally true. It is not pretended that he was ignorant that the object of the inquiry was to ascertain whether *Brunell* was a person to be trusted. Professing to give an answer to that inquiry, he not only says that he believes *Brunell* to be an honest man, but he adds by way of inducing the Plaintiff to give credit to him, that he had trusted him, and would trust him more. Was that all that the Defendant knew to be material? He knew that *Brunell* had been a bankrupt. He had agreed to give him credit, and *Brunell* had ordered goods, but in consequence of hearing that writs were out against *Brunell*, the Defendant desired to see his books, which *Brunell* refused; upon which the Defendant limited his credit. Was not that a fact to be communicated? In a subsequent conversation he says triumphantly that he did not think the Plaintiff would have been such a cake. These circumstances certainly afforded evidence of fraud. To determine upon that evidence was the peculiar province of the jury. Still however I think that there was ground to suspect that the Plaintiff himself had practised a trick upon the Defendant. And in a case of this nature, if the Defendant thinks it worth his while to pay the costs, I think he ought to be allowed the opportunity of taking the opinion of another jury.

Rule absolute on payment of costs.

May 13th.

FEISE *v.* LINDER.

Action on the case for saying of a merchant, "he has brought a false bill of lading for half the cargo (meaning the lading of a particular ship) already," whereby he was injured as such merchant, and lost the confidence of several persons, (without naming them) was held not maintainable, and judgment accordingly arrested, because the words did not of themselves impute any crime.

THIS was an action for words. The 5th count of the declaration stated that the Plaintiff was an honest person, and as such had conducted himself, and never was suspected of fraud, forgery, or deceit; that he in the course of his business as a merchant, and before the speaking and publishing of the words, had received and had a certain bill of lading of and relating to divers goods imported into this kingdom in a ship called the *London*, consigned to the

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plaintiff or his aſſigns, which ſaid bill of lading he had produced to the Defendant, and had required the delivery of the goods; yet the Defendant well knowing the premiſes, but intending to prejudice him in his character, credit, and buſineſs, in a certain diſcourſe with divers perſons concerning the Plaintiff, and the ſaid bill of lading ſo produced by him as aforeſaid, falſely, maliciouſly, openly, and publicly, and in the preſence and hearing of the ſaid perſons ſaid, ſpoke, and with a loud voice publiſhed of and concerning the Plaintiff in his ſaid buſineſs, and of and concerning the ſaid bill of lading, the falſe, ſcandalous, malicious, and defamatory words following, that is to ſay, "He (meaning the Plaintiff) has brought a forged bill of lading for half the cargo (meaning the lading of the ſaid ſhip) already." By reaſon of the ſpeaking and publiſhing which ſaid words the Plaintiff was greatly injured in his character and credit, and in his ſaid buſineſs, inaſmuch as divers perſons, ſubjects of this realm, and others, who were uſed and accuſtomed to place truſt and confidence in him, and to deal with him in his ſaid buſineſs, on occaſion of the ſpeaking and publiſhing of the ſaid words had refrained from and refuſed to deal with him, and the Plaintiff by reaſon thereof was ſuſpected to be guilty of fraud, *damno, &c.* The Defendant pleaded that before the ſpeaking of the ſaid words the Plaintiff obtained of him certain goods by the production of a forged bill of lading, by reaſon whereof the Defendant ſpoke the ſaid words, without this, that he ſpoke them before. The Plaintiff replied, *de injuriâ ſuâ propriâ abſque tali cauſâ.*

The cauſe was tried before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after laſt *Hilary* Term, and a verdict was found for the Plaintiff on the above 5th count.

In this term *Lens* Serjt. obtained a rule *niſi* for arreſting the judgment, on the ground that the words alleged to have been ſpoken by the Defendant contained in themſelves no criminal charge againſt the Plaintiff, inaſmuch as they did not impute to him any knowledge of the bill of lading having been forged, and that there was no allegation of an intention to inſinuate ſuch knowledge in the count.

Shepherd Serjt. now ſhewed cauſe, and contended that as the words were averred to have been falſely and maliciouſly ſpoken, the declaration was ſufficient to charge the Defendant after verdict; that no averment could be neceſſary of the bill of lading having

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been forged, since the words would not be less actionable if it had not been forged; that where the words spoken may or may not impute criminal conduct to the Defendant, if they be averred to have been spoken maliciously, it must be intended after verdict that they conveyed an imputation of a criminal nature.

Lord ALVANLEY Ch. J. The argument which has been urged for the Plaintiff goes this length, that any words of reproach may be made actionable by the introduction of the word "maliciously" in the declaration; I believe however that has been decided otherwise. The general rule is, that words are only actionable when accompanied by special damage, unless they imply something by which the party of whom they are spoken would be subjected to punishment either for a felony or a misdemeanor (*a*). But these words do not impute any thing by which such a penalty would be incurred. Though the words be maliciously spoken the party will not be entitled to a remedy unless he sustain special damage from them; yet as no one ought to utter a falsehood, if any special damage be occasioned by such falsehood, the party who speaks them must be answerable though he impute neither felony nor misdemeanor. To bring a forged bill of lading might or might not be an innocent thing, and though the words are capable of being construed in a bad sense, yet this declaration contains no sufficient charge to sustain the verdict.

HEATH J. I am of the same opinion. It has been clearly settled that epithets will not make that a crime which does not otherwise appear to be so. The charge in this case may only amount to extreme negligence in the Plaintiff in bringing a forged bill of lading when he ought to have discovered the forgery, and yet impute no crime as arising from a knowledge of the forgery.

ROOKE J. The rule of law as to what words are actionable and what not, is, that the words spoken must either subject the party to an indictment for a felony or a misdemeanor, or occasion some special damage (*b*). The present case does not fall within that rule.

(*a*) Exceptions to this general rule are, words which subject a man to punishment in a particular place by custom, or which tend to his disherison, or which are spoken of him in his office, profession, trade, &c. or which impute to him an infectious disease. See instances of these several kinds *Com. Dig.* tit. *Action on the Case for Defamation*, *D.* to. to *D.* 29.

(*b*) On the subject of special damage, the mode of alleging it, and the consequences of so doing see *Croft* v. *Borte*, 1 *Saund.* 243. *b.* *n.* 5. and *n.* 8. by Mr. Serjt. *Williams*; and *Todd* v. *Hastings*, 2 *Saund.* 307. *n.* 1. by the same learned author.

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CHAMBRE J. The eſſence of the crime ſuppoſed to be imputed to the Plaintiff is knowledge. If this declaration could be ſuſtained, we might expect ſimilar actions by letter-carriers, of whom it may frequently be ſaid that they have brought forged bills to perſons to whom they deliver letters.

Rule abſolute (*a*).

(*a*) So it has been holden, that to ſay of another that he had ſued upon forged bonds, or that he had recovered 400*l.* by forgery, is not actionable; for the words do not impute to the party of whom they are ſpoken any knowledge of the forgery. *Twiſleton* v. *Hobbs*, 1 *Vent.* 3. *Hare* v. *Mellor*, 3 *Leon.* 138.

ROE on the Demiſe of GEORGE WALKER *v.* JOSEPH WALKER. *May* 16th.

THIS ejectment was brought to recover the poſſeſſion of ſix acres of land, ſix acres of meadow, and ſix acres of paſture, with the appurtenances, at *Horninglow* in the county of *Stafford*, and came on to be tried at the laſt *Lent* aſſizes for that county, before Mr Juſtice *Lawrence*, when it was agreed that a verdict ſhould be taken for the Plaintiff, ſubject to the opinion of this Court on the following caſe:

A. deviſed to his wife his houſe and goods, with all his lands, goods, and chattels whatſoever and whereſoever, for her life; and after her death to two younger ſons till they ſhould attain the age of 15, for their education. He then deviſed his aforeſaid houſe, goods, and chattels, equally to be divided between all his ſons and daughters, ſhare and ſhare alike. Held that under the laſt clauſe of the deviſe the lands did not paſs.

William Walker, grandfather of *George Walker* the leſſor of the Plaintiff, being ſeiſed in fee of a houſe in which he dwelt, and about ſeven acres of land, ſituate at *Horninglow* aforeſaid, in the ſaid county of *Stafford*, by his laſt will, bearing date the 13th *June* 1762, executed in the preſence of three witneſſes, deviſed as follows: "Firſt, I give, deviſe, and bequeath unto my wife *Mary Walker*, my houſe wherein I now dwell, with my goods that are in and about the ſame, with all my lands, goods and chattels whatſoever and whereſoever they be, for and during her natural life, ſhe paying all my debts and funeral charges. And if my aforeſaid wife ſhould die before my ſons *Henry Walker* and *Robert Walker* come to the age of fifteen, then my mind and will is, that my houſe, lands, goods, and chattels, that is to ſay, the rents ariſing from the ſame, ſhall be employed to the bringing of them up until they come to the age of fifteen; then my mind and will is, that my aforeſaid houſe, goods, and chattels, ſhall be equally divided amongſt all my ſons and daughters that ſhall be living at that time, ſhare and ſhare alike." The ſaid *William Walker* died on the 24th *Auguſt* 1762, ſeiſed of the ſaid houſe and land, without

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out having revoked his ſaid will, and leaving the ſaid *Mary* his widow, *John Walker* his eldeſt ſon and heir at law, and *William*, *Mary*, *Thomas*, *Henry*, *Joſeph* (the Defendant), *Samuel*, *Hannah*, and *Robert Walker*, his younger children him ſurviving. The ſaid *Henry Walker* attained the age of fifteen years in the life of the ſaid *Mary*, widow of the ſaid *William* the deviſor; the ſaid *Robert Walker* died on the 11th *June* 1769, being only 12 years of age, in the life-time of the ſaid *Mary*, widow of the ſaid *William* the deviſor; the ſaid *Mary* the widow of the ſaid *William* the deviſor died on the 10th *April* 1784, in poſſeſſion of the ſaid houſe and land under the ſaid will. *John Walker* the father of the leſſor of the Plaintiff in this ejectment, and the other ſurviving children of the teſtator immediately after the death of *Mary* the widow of the teſtator, to whom he deviſed the eſtate, lands, and premiſes for life, with full knowledge of the contents of the will, divided the deviſed meſſuage, lands, and premiſes, into as many equal parts or ſhares as there were children then living, and threw lots for their reſpective ſhares or diviſions of the deviſed eſtate and lands. *John* the leſſor's father, as the eldeſt ſon of the teſtator, purſuant to ſuch diviſion drew the firſt lot, and thereupon entered into the poſſeſſion of the ſaid lot ſo drawn by him, and held and enjoyed the ſame in ſeveralty from that time until his death. And the ſaid *Joſeph* and the other ſurviving children at the ſame time entered into their reſpective ſhares ſo drawn by lot as aforeſaid, and held and enjoyed the ſame in ſeveralty as deviſees under the will of the ſaid *William Walker* the deviſor. The ſaid *Joſeph* the Defendant ſtill continues in poſſeſſion of his ſhare, never having been moleſted or interrupted in the poſſeſſion thereof by *John* the leſſor's father, who died on the day of in the year of our Lord nor until the preſent ejectment was brought.

The queſtion for the opinion of the Court was, Whether the land of which the ſaid *William Walker* the deviſor ſo died ſeiſed as aforeſaid, paſſed by his ſaid will to his younger children living at the death of his ſaid widow *Mary*, or deſcended through his eldeſt ſon *John* to his ſaid grandſon and heir at law *George*, the leſſor of the Plaintiff? If the Court ſhould be of opinion that the land did ſo deſcend to the ſaid *George* as aforeſaid then the verdict to ſtand; but if the Court ſhould be of opinion that the ſaid land did paſs by the

the ſaid will as aforeſaid, then the verdict to be entered for the Defendant.

Beſt Serjt. was to have argued in ſupport of the claim of the leſſor of the Plaintiff,

But *The Court* deſired *Williams* Serjt. who was on the other ſide, to begin. He obſerved, that though he felt to a certain degree that he had to contend in this caſe with the old maxim as applied to a teſtator, *viz. quod voluit non dixit*, ſtill he ſhould contend that there was on the face of this will ſuch a plain and manifeſt intent in the teſtator to deviſe amongſt his children all that he had before deviſed to his wife, that the Court might ſupply ſuch words as would effectuate that intent. This intent, he ſaid, might plainly be collected from the proviſions of the will, for after giving to his wife for life all that he had, the teſtator anxiouſly guarded againſt the event of her death before his two younger children had attained the age of 15, by leaving all that he had given to his wife to be employed about their education till they attained that age, and then he deviſed what he had ſo diſpoſed of for the above period amongſt his family. He inſiſted the Court could not intend that the teſtator meant to give a leſs eſtate to all his children, including his heir at law, than he had before deviſed for the education of two younger children; and though it was true that expreſs words were neceſſary to diſinherit an heir at law, yet that rule had generally been applied to caſes where the deviſe from the heir was to ſtrangers, and not as in this caſe amongſt the deviſor's children. He inſtanced the caſe of a deviſe of copyhold without a ſurrender to the uſe of the will, where the Court of *Chancery* gives effect to the deviſe againſt the heir at law, though the deviſe be not correct in form. [Lord *Alvanley* Ch. J. In that caſe the court of equity only acts upon the conſcience of the heir at law. I agree that if a deviſe be after the death of a teſtator's wife to his ſecond ſon, the heir at law will take during the life of the wife, and that if the deviſe be after the death of the wife, to the deviſor's firſt ſon, there the heir at law being the firſt ſon, will not take during the life of the wife, but ſhe will have it for her life; there, however, though the words of excluſion be not expreſs, yet the firſt ſon is excluded by neceſſary intendment.] He referred to *Bagnell* v. *Abnett*, 4 *Mod.* 141. where the teſtator having two houſes, one called the upper houſe and the other called the lower houſe, deviſed *all* his tenements for the payment of his debts until his grandſon ſhould

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come of age, and afterwards she deviſed all his ſaid tenements, *videlicet*, two parts of the lower houſe for raiſing 200*l.*, the remainder to his grandſon and his heirs; the queſtion was, Whether the *videlicet* and the clauſe that immediately followed it did not reſtrain the deviſe to the lower houſe only, or whether the whole paſſed to the grandſon by the words that went before, *viz* all the ſaid tenements? And it was holden that both the houſes paſſed to the grandſon.

The Court obſerved they never knew an inſtance in which the ſubject of deviſe was ſupplied on account of a ſuppoſed omiſſion; that indeed no miſtake in a will ever could be rectified by the Court, unleſs it could be firſt demonſtrated that ſuch miſtake did exiſt, and that in the preſent caſe, however ſtrongly they might conjecture what the deviſor intended to have done from the previous deviſe to his wife and his younger children, yet it was not of neceſſity to intend that he meant to have added the word "lands" in the laſt clauſe of his will. They alſo remarked that in *Bagnell* v. *Abnett* the words following the *videlicet* were abſolutely inconſiſtent with the preceding terms of the deviſe, and conſequently they were rejected.

Poſtea to the leſſor of the Plaintiff.

May 16th.

BURRELL *v.* DODD.

The cuſtomary tenement in the north of *England*, which are parcel of the reſpective manors in which they are ſituate, and deſcendible from anceſtor to heir by the hereditary right called tenant right, and held of the lord according to the cuſtom, are not within the ſtatutes of partition.

THIS was a proceeding on the writ *de partitione faciendâ*. The declaration was as follows: "*Northumberland*, to wit, *Thomas Dodd* was ſummoned to anſwer *Cuthbert Burrell* in a plea wherefore whereas the ſaid *Cuthbert* and *Thomas* hold together and undivided 70 acres of land, 70 acres of meadow, and 70 acres of paſture and common of paſture, with the appurtenances in the pariſh of *Simonburn* in the ſaid county of *Northumberland*, of which the ſaid *Thomas* denieth partition to be made between them, according to the form of the ſtatute in ſuch caſe made and provided, and unjuſtly permitteth not the ſame to be done, and contrary to the form of the ſtatute: And whereupon the ſaid *Cuthbert* by *C. S.* his attorney ſays, that whereas the ſaid *Cuthbert* and the ſaid *Thomas* hold together and undivided the tenements aforeſaid with the appurtenances whereof it belongs to the ſaid *Cuthbert* and his heirs to have one moiety of the tenements aforeſaid with the appurte-

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nances, to hold to him and his heirs in ſeveralty; ſo that the ſaid *Cuthbert* of his moiety belonging to him of the tenements aforeſaid, with the appurtenances, and the ſaid *Thomas* of his moiety belonging to him of the tenements aforeſaid with the appurtenances, may ſeverally apportion themſelves, he the ſaid *Thomas* denieth partition thereof to be made between them, according to the form of the ſtatute in ſuch caſe made and provided, and unjuſtly permitteth not the ſame to be done, and contrary to the form of the ſaid ſtatute; whereupon he the ſaid *Cuthbert* ſays that he is injured and hath damage of 100*l.*, and therefore he brings his ſuit," &c. To this declaration the Defendant pleaded, 1ſt, *Non tenuit modo et formâ*, and 2dly, That the premiſes in queſtion were parcel of the manor of *Henſhaw* granted and grantable by copy of the court-rolls by the lord of the ſaid manor in fee ſimple or otherwiſe, *at the will of the lord*. On theſe two pleas iſſues were joined. He then pleaded "that partition between the ſaid *Thomas* and the ſaid *Cuthbert* of the tenements aforeſaid with the appurtenances ought not to be made becauſe he ſays that the tenements with the appurtenances in the ſaid declaration mentioned now are, and from time whereof the memory of man is not to the contrary have been ſituate, lying within, and parcel of the ſaid manor of *Henſhaw*, in the ſaid pariſh of *Simondburn*, and cuſtomary tenements of that manor, and during all that time deſcendible, and which have deſcended from anceſtor to heir as of the hereditary right of the tenants called tenant right, held of the lord of the ſaid manor for the time being, as of that his manor by divers rents and certain ſervices, according to the cuſtom of the ſaid manor; and this he the ſaid *Thomas* is ready to verify; wherefore he prays judgment if partition between the ſaid *Thomas* and the ſaid *Cuthbert* of the tenements with the appurtenances ought to be made, &c. To this plea there was a demurrer, aſſigning for cauſes, "that it is not ſhewn or alleged in or by the ſame plea how or in what manner the tenements with the appurtenances in the ſaid declaration mentioned are or have been deſcendible, nor how or in what manner they have been deſcendible or have deſcended from anceſtor to heir, nor from what anceſtor to what heir they have been deſcendible or have deſcended, nor as of what hereditary right, nor as the hereditary right of what tenants they have been deſcendible or have deſcended, nor by what rents nor by what ſervices they have been held of the lord of the ſaid manor; and alſo for that the ſame plea is in various other reſpects inſufficient, defective, and informal." The Defendant joined in demurrer.

This

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This case was shortly spoken to in *Hilary* Term last, when the Court intimated a wish that the Defendant should consider whether he could not add to his plea after the words "held of the lord of the said manor for the time being," the words "at the will of the lord," as that allegation, if true, would decide the question. Accordingly the case stood over till this term, when the Defendant's counsel having informed the Court that they could not safely amend the plea in the manner proposed,

Bayley Serjt. was heard in support of the demurrer. The question arising upon this demurrer is, Whether the estate which is the subject of this writ be of such a nature as to fall within the provisions of the statutes of partition 31 *H.* 8. *c.* 1. and 32 *H.* 8. *c.* 32.? It may be admitted that mere copyhold estates are not within the provisions of the statutes of partition; but the admission does not extend to customary freeholds, and on the face of this plea the Court must hold the estate in question to be a customary freehold. All the precedents in which customary freeholds are described use the words "parcel of the manor" as part of the description. The reason why mere copyholders are not within the statutes of partition is, that they have no estate of inheritance, but hold entirely at the will of the lord; whereas customary freeholders have a freehold in point of interest, as is admitted by Mr Justice *Blackstone* in his law tracts, tit. *Considerations on Copyholders*, vol. 1. p. 132 to 138. where he distinguishes between those who hold by copy of court-roll at the will of the lord and those who hold by copy of court roll according to the custom of the manor; the former he considers to be tenants in pure villenage, the latter in villein socage (*a*). The reason assigned by Lord *Coke*, 2 *Inst.* 325. why tenants in antient demesne are entitled to have a summons to warranty is illustrative of this doctrine; for he puts it on the ground of the freehold being in the tenants, which he says is not the case with a tenant by copy of court-roll in a court-baron. On these pleadings it must be intended that the tenants do not hold at the will of the lord. Indeed on this point the case of *Gale* v. *Noble*, *Carth.* 432. is very strong, for there on a trial at bar in ejectment for lands, parcel of the manor of *Corsham* in *Wilts*, which by very antient books of that manor appeared to be parcel of the Duchy of *Cornwall*, and to pass by surrender and copy of court-roll, the lands were holden to be customary freehold and not copyhold, because

(*a*) In *Co Litt.* 59*b*. it is said that by custom a freehold and inheritance may pass by surrender in the lord's court without the leave of the lord.

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they were not granted *ad voluntatem domini manerii*, but only *tenend' secundum consuetudinem manerii*. The Court are bound to take notice of the peculiarities attending the tenures in gavel-kind and borough *English*; but they are not bound to take notice of the peculiarities attending theſe cuſtomary freeholds, however general they may be in the North of *England*. [*Chambre* J. In every inſtance in which theſe tenures have come before Courts they have taken notice of them.] In *Rogers v. Brandly*, 2 *Vent.* 143. in replevin a conuſance under perſons deriving title from one *J. M.* "as ſeiſed in fee of a cloſe called *Underway*, parcel of the manor of *Liſcard*, of which the place where, &c. was and is parcel, according to the cuſtom of the ſaid manor," was held to be a conuſance under perſons having a freehold, becauſe it was not ſaid that they held at the will of the lord. [*Heath* J. In that caſe no tenancy at will could be intended where the allegation was of a ſeiſin in fee.]

Clayton Serjt. was to have argued *e contra*,

But *The Court* ſtopped him, ſaying it was unneceſſary to enter into the nature and peculiarities of the tenure under which the lands in queſtion were holden as diſcloſed by the plea; for that it was a ſufficient objection to the Plaintiffs obtaining judgment, that the land upon the face of the plea appeared not to be freehold properly ſo called, and therefore not within the ſtatutes of partition; that the plea alleged as an excuſe for the defendant's not making partition, that the premiſes ſought to be divided were not in their nature diviſible, being "parcel of the manor," and held of the lord as "tenant right," which ſufficiently negatived its being freehold (*a*), for that no freehold could, ſtrictly ſpeaking, be ſaid to be *parcel of the manor*; they alſo referred to *Coke's Cop. f.* 32. where ſpeaking of the various ſorts of tenants now known by the name of copyholders, as diſtinguiſhed from what they were formerly, he obſerves "they were every where then called tenants by copy of court-roll, or tenants at will, according to the cuſtom of the manor, which ſtyles import unto us three things: 1. *nomen*, 2. *originem*, 3. *titulum*. Firſt, his name is tenant by copy of

(*a*) In *Glover v. Cope*, 1 *Show.* 257. where the queſtion was, Whether the ſurrenderee of a copyhold could maintain covenant againſt the leſſee of the ſurrenderor after the leſſee had aſſigned over? *Levinz* Serjeant *argendo*, ſaid, "the tenant-right eſtates in the North, which are not freeholds, will be within the ſame conſideration as copyholds."

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court roll, for he is not called tenant by court-roll, but by copy of court-roll, and this is the sole tenant in law who holdeth by copy of any record, charter, deed, or any other thing; 2d, His commencement is at the will of the lord, for these tenants in their birth as well as the customary tenants upon the borders of *Scotland*, who have the name of tenants, were mere tenants at will, and though they keep the customs inviolate, yet the lord might *sans* control, eject them; neither was the estate hereditary in the beginning, as appeareth by *Britton*; for if they died their estate was presently determined, as in case of a tenant at will at common law. And in some points to this present hour the law regardeth them no more than a mere tenant at will; for the freehold at the common law resteth not in them but in their lords, unless it be in copyholds of frank tenure, which are most usual in ancient demesnes."

Judgment for the Defendant.

(IN THE EXCHEQUER CHAMBER.)

May 17th.

DAVIS Gent., one, &c. *v.* EDMONSON, in Error.

A common informer may recover penalties against an attorney for not entering his certificate according to the provisions of 37 *Geo.* 3. *c.* 90. *s.* 26. though no power is expressly given to him by that statute; for the 25 *Geo.* 3. *c.* 80 which gives that power, and the 37 *Geo.* 3. *c.* 90 are *in pari materiâ*.

ERROR from a judgment of the Court of *King's Bench* in debt for a penalty of 50*l.* for having "in expectation of gain, fee, and reward, sued out of the court of our lord the king of the Bench at *Westminster*, a certain writ of our lord the king, commonly called a *capias ad respondendum*, at the suit of one *W. S.* and one *W. D.* against the Defendant in error, without having entered such certificate as in and by the statute in such case made and provided is directed, *contrà formam*," &c. The Defendant in error having obtained judgment in the court below for the penalty, the Plaintiff in error assigned several errors upon the record; but the only objection relied upon in argument in this court was, that the 37 *Geo.* 3. *c.* 90. *s.* 30. which created the penalty, gave no such action as the present to a common informer; but that the penalty was only recoverable by information at the suit of the attorney-general. This case was twice argued; 1st, by *Bayley* Serjt. for the Plaintiff in error and *Lawes* for the Defendant in error, and 2dly, by *Marryat* for the former and *Gibbs* for the latter.

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The Court took time to consider of their opinion, which was this day delivered by

Lord ALVANLEY Ch. J. The question in this case arises out of the provisions of the 25 *Geo.* 3. *c.* 80. and the subsequent statutes which have been passed upon the same subject. That act imposes a duty on certificates to be taken out by solicitors and attornies practising in the courts of law and equity. The manner in which the certificate is thereby directed to be taken out is as follows: Every solicitor and attorney is annually to give into the court in which he has been admitted a note of his name and residence, upon which certain officers are directed to issue the certificates in question, renewable ten days previous to the period of their expiration. The seventh section imposes a penalty of 50*l.* upon every person who shall in his own name, or in the name of any other person, sue out any writ or process, or commence, prosecute, or defend any action or suit, or any proceedings, as a solicitor, attorney, notary, proctor, agent, or procurator, in any of the courts aforesaid, in expectation of any fee or reward, without having obtained such certificate, or shall deliver in a false place of residence, to evade the payment of the higher duties imposed by the act, to be recovered and applied as thereinafter is directed; and such person is made incapable of suing in any court of law or equity for the recovery of any fee, reward, or disbursement, on account of prosecuting or defending any such action, suit, or proceeding. Then follow two clauses which are material to the consideration of the question before the Court. The eighth section enables persons who have taken out certificates to act for others who have also taken them out; and the ninth provides that any person who has taken out a certificate in one court may practise in any other court in which he is sworn, although his certificate did not issue from that court. Both these clauses were introduced for the benefit of the party upon whom the penalty attaches; and neither of them is re-enacted in the subsequent statute 37 *Geo.* 3. *c.* 90. By *s.* 29. of the 25 *Geo.* 3. *c.* 80. it is directed that all penalties created by that act may be sued for by action of debt, bill, plaint, or information, to the use of the Plaintiff who shall sue for the same. The 37 *Geo.* 3. *c.* 90. was passed for the purpose of creating several new stamp duties, and also for better securing the duties on certificates to be taken out by solicitors and attornies. The first part of the act relates to the new duties: and the 6th section provides that all powers, provisions,

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rules, methods, articles, clauſes, penalties, and forfeitures, and diſtributions of penalties and forfeitures of all former acts in force at the time of the paſſing of that act, and not thereby altered, ſhould, as far as the ſame were applicable, be in force with reſpect to the additional and other duties therein before mentioned. In the latter part of the argument it was very properly admitted that this ſection muſt be confined to the new duties created by the former part of the act, though at firſt it was contended that it might be applied to penalties mentioned in the ſubſequent part of the act. The proviſions reſpecting certificates begin at ſection 26. which, after reciting that by the 25 *Geo.* 3. certain duties had been impoſed on certificates, and that for avoiding frauds it was expedient that thoſe certificates ſhould be taken out only at the head office for ſtamps, directs that every ſolicitor and attorney ſhall annually deliver in at the head office for ſtamps a note containing his name and place of abode, in the ſame manner as he had before delivered in ſuch note to the officer of the court. It then provides that the certificates when obtained ſhall be entered with the officer of the court, and alſo ſpecifies the periods at which the certificates ſhall bear date, and when they ſhall expire. The 30th ſection of the act impoſes the penalty; and enacts, that if any perſon ſhall ſue out any writ or proceſs, or commence, proſecute, carry on, or defend any action or ſuit for fee or reward, or ſhall do any act in the ſaid court as an attorney, &c. without obtaining a certificate in the manner thereinbefore directed, or without entering the ſame in one of the courts wherein he ſhall be admitted, or ſhall deliver in at the head office any account of his place of reſidence, contrary to the 25 of *Geo.* 3. with intent to evade the payment of the higher duties by the ſaid act impoſed, he ſhall for every ſuch offence forfeit and pay the ſum of 50*l.*, and be rendered incapable of ſuing for the recovery of any fee, &c. on account of any action carried on without ſuch certificate. The operation of this part of the act is to ſubſtitute a new mode of taking out certificates in the place of that preſcribed by the 25 *Geo.* 3. continuing the ſame penalty, and preſerving and referring to the regulations of the 25 *Geo.* 3. ſo far as they require a true account to be given of the place of reſidence, but adding indeed a new penalty for the offence of not entering the certificate. This part of the act however is totally ſilent reſpecting the mode in which the penalty ſhall be re-

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covered. It has been contended that the 37 *Geo.* 3. having altered the offence created by the 25 *Geo.* 3., or having created a new one, and having added the offence of not entering the certificate, the penalty can only be ſued for in the manner preſcribed by the act which creates the offence: and it is admitted that where a penalty is created and no particular mode pointed out in which it ſhall be recovered, nor any particular perſon ſpecified to whom it ſhall be paid, that it can only be ſued for by the king. It is therefore urged for the Plaintiff in error, that the penalty to be recovered under the 37 *Geo.* 3. is a new and ſeparate penalty, and as much independent of the 25 *Geo.* 3. as if that act had been altogether repealed. It cannot be denied that the practice of authoriſing common informers to ſue is an efficacious expedient, without which the revenue laws would fall very ſhort of their object. It would therefore be ſingular indeed if an act of parliament paſſed for the expreſs purpoſe of further ſecuring the duties impoſed by the 25 *Geo.* 3. by the introduction of regulations to prevent fraud ſhould have repealed that ſection of the 25 *Geo.* 3. which empowers and invites common informers to ſue for the penalties thereby impoſed. Without very clear reaſons for believing this to be the intention of the legiſlature we ſhould feel great reluctance in adopting ſuch a conſtruction. The counſel for the Plaintiff in error, feeling this difficulty, contended that the 25 *Geo.* 3. was not repealed, but that it was ſtill competent to a common informer to ſue for a penalty under that act where a certificate had not been obtained. But upon looking into the acts it appears moſt clearly that the offence of not obtaining the certificate is totally different ſince the paſſing 37 of *Geo.* 3.; the certificate according to that act being to be taken out in a new way. For the Defendant in error, the caſe of *Duck* v. *Addington*, 4 *T. R.* 447. has been relied on. The 10 *Geo.* 3. *c.* 44. *ſ.* 7. relative to hackney coaches enacts, that the forfeitures and penalties thereby inflicted may be recovered and levied not by the commiſſioners, but by any juſtice of the peace, "by ſuch ways and means as the penalties and forfeitures in the act of the 9th of *Anne* are directed to be levied and recovered." The 9 *Ann.* *c.* 23. only empowered the commiſſioners to commit to priſon upon default of diſtreſs, but ſubſequent acts had given them other powers, and the 5th ſection of the 10 *Geo.* 3. *c.* 44. had declared that they had the power of immediate commitment. The

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Court of *King's Bench* held, that all the acts were made *in pari materiâ*, and formed one general ſyſtem of law upon the ſubject, and that the legiſlature had intended to give the ſame power to the juſtices of immediate commitment that was conferred upon the commiſſioners. I have looked into thoſe acts: and I am perfectly clear that in the preſent caſe we are as much bound to conſider the two acts of the 25 *Geo.* 3. and 37 *Geo.* 3. as made *in pari materiâ*, and to enforce them accordingly, as the Court of *King's Bench* were in the caſe of *Duck* v. *Addington*. It remains to be conſidered whether any other acts have paſſed demonſtrating that it was not the intention of the legiſlature either to repeal the 25 *Geo.* 3., or to render its proviſions leſs efficacious. Upon this point the 39 & 40 *Geo.* 3. *c.* 72. is extremely ſtrong and almoſt deciſive. The ſeventh ſection of that act, after reciting the 25 *Geo.* 3. and 37 *Geo.* 3. ſtates, that doubts had ariſen whether notaries not being admitted in any courts were liable to the duties impoſed by thoſe acts, for remedy whereof it enacts, that every perſon who ſhall act as a public notary without having been admitted in any court, and without having delivered in his name and place of reſidence, and taken out ſuch certificate as is directed by the ſaid recited acts, ſhall forfeit 50*l.* and be incapable to act as a notary, or recover any fee on account of ſuch act; and every ſuch penalty ſhall be recoverable and recovered, and applied in like manner in every reſpect as any penalty of the like value impoſed by the ſaid laſt-recited acts, or either of them, may be recovered and applied. The object of this act was to put notaries preciſely in the ſame ſituation with attornies and ſolicitors. The penalty is preciſely the ſame as that which is impoſed upon attornies and ſolicitors, and the incapacity is expreſſed in the very ſame words as thoſe which are employed in the 25 *Geo.* 3. and 37 *Geo.* 3. Yet by the very words of the 39 & 40 *Geo.* 3. the penalty is made recoverable by a common informer. But this is not all. Penalties having been incurred under the 37 *Geo.* 3. and many actions having been brought for the recovery of them by common informers, the legiſlature upon the application of the parties ſued thought proper to paſs two acts of indemnity, *viz.* the 37 *Geo.* 3. *c.* 93. and the 39 & 40 *Geo.* 3. *c.* 72. *ſ.* 17 & 18. and to relieve the Defendants upon payment of 100*l.* It is true, that if no penalty were previouſly impoſed, an act of indemnity would not create one. But the conduct of the legiſlature affords very ſtrong

evidence

evidence that all the acts which had paſſed upon this ſubject were conſidered as forming one body of law, and that it never was intended that any of the ſubſequent acts ſhould weaken the proviſions of thoſe which had preceded. The very ſame objection which is raiſed in this caſe was taken in Dr. *Foſter*'s caſe, 11 *Co.* 56. *b.* Dr. *Foſter* having been ſued for recuſancy by a common informer upon the 23 *Eliz. c.* 1. which gave one-third of the penalty to the queen, one-third to the poor, and one-third to the informer, it was contended that the right of the informer to ſue was taken away by the 35 *Eliz. c.* 1., which empowered the queen for the more ſpeedy recovery of the penalty to ſue by action of debt, bill, plaint, or information in the King's Bench, Common Pleas, or Exchequer. But the Court held, that as the latter ſtatute was made for the more ſpeedy recovery of the penalty, it was not intended to invalidate the proviſions of the former act; and being all in the affirmative, ſhould not repeal or abrogate a precedent affirmative law. So in the preſent caſe, it never could have been the intention of the legiſlature by the 37 *Geo.* 3. to take away one of the great ſecurities introduced by the 25 *Geo.* 3. The only object of the 37 of *Geo.* 3. appears to have been to ſubſtitute another mode of taking out certificates, but the penalty and the mode of recovery were intended to remain the ſame. The only difficulty therefore in the deciſion of this caſe ariſes from that of *Barnard* v. *Goſtling*, 2 *Eaſt*, 569. in which the Court of King's Bench came to a determination upon this point different from that which this Court is inclined to adopt. But it is obſervable, that the principal queſtion there agitated was, whether an action could be brought for the penalty againſt two perſons jointly. It was argued indeed, that all the ſtatutes upon this ſubject were *in pari materiâ*, and that the remedy given by the 25 *Geo.* 3. was not taken away; but the main point to which the Court addreſſed their attention, and upon which they took time to conſider, ſeems to have been, Whether the action could be maintained againſt two? The Court, in giving judgment, founded themſelves on the ground that the 37 *Geo.* 3. gave no ſuch action to the common informer, and it ſeems to have been almoſt taken for granted that if the 6th ſection of that act did not apply to the ſubſequent part of that act no ſuch action could be maintained. But conſidering the 37 *Geo.* 3. as an act paſſed to enforce the collection of the duties created by the 25 *Geo.* 3., and referring to the principles by which acts of this kind have been uſually conſtrued,

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we think the 37 *Geo.* 3. is only a ſubſtitution of a new mode, but that the penalties are ſtill recoverable by the ſame perſons by whom they were recoverable previous to the paſſing of that act. Indeed if it could be ſucceſsfully contended that the proviſions of the 25 *Geo.* 3. are not incorporated into the 37 *Geo.* 3. where not expreſsly altered, perſons taking out certificates would, under ſuch a conſtruction, loſe the benefit afforded them by the 8th and 9th ſections of the 25th *Geo.* 3., but which are not re-enacted in the ſubſequent act. Clearly, therefore, it was the intention of the legiſlature that the two acts ſhould be conſtrued *in pari materiâ*.

Judgment affirmed.

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HADKINSON *v.* ROBINSON.

If a cargo of a periſhable nature be inſured from *A.* to *B.* with the uſual memorandum, and in the courſe of the voyage information be received by the maſter that the port of *B.* is ſhut againſt the ſhips of his nation, in conſequence of which the commander of the convoy orders the ſhip to proceed to another port, and the cargo be there ſold by orders of the Vice-Admiralty Court for a very ſmall ſum of money, the aſſured cannot abandon as for a total loſs. It ſeems that if the voyage be loſt in conſequence of the port of deſtination being ſhut againſt the ſhip inſured, the aſſured cannot declare upon this as a loſs within the policy.

THIS was an action on a policy of inſurance upon a cargo of pilchards, on board the ſhip *Paſcaro*, at and from *Mounts Bay* or any port in *Cornwall*, to *Naples*, with leave to join convoy at *Falmouth* or elſewhere. The policy contained the uſual memorandum that corn, fiſh, ſalt, fruit, flour, and ſeed were warranted free from average unleſs general, or the ſhip ſhould be ſtranded. The declaration averred the loſs in the following manner: "And the ſaid Plaintiff further ſays, that after the loading of the ſaid pilchards on board the ſaid ſhip or veſſel, to wit, &c. the ſaid ſhip or veſſel, with the ſaid pilchards ſo on board thereof as aforeſaid, to be carried therein upon the ſaid voyage in the ſaid writing or policy of aſſurance mentioned, departed and ſet ſail from the port of *Penzance* aforeſaid, in the county aforeſaid, on her ſaid intended voyage in the ſaid writing or policy of aſſurance mentioned, and afterwards, and whilſt the ſaid ſhip with the ſaid pilchards on board was ſailing and proceeding on her ſaid voyage, and before her arrival at *Naples* aforeſaid, to wit, on, &c. the port of *Naples* aforeſaid was, by the perſons then and there exerciſing the powers of government in the kingdom of *Naples*, ſhut againſt all ſhips the property of any of the ſubjects of our Lord the now King, or ſailing under the colours of our Lord the now King, and againſt all merchandizes the property of any ſuch ſubjects, carried in ſuch ſhips, under pain of the ſaid ſhips and merchandizes being con-

fiſcated

ſiſcated by the perſons then and there exerciſing the powers of government in the kingdom of *Naples*, whereby the ſaid ſhip, with the ſaid pilchards on board the ſame, (the ſaid ſhip then and there being the property of ſome then ſubject or ſubjects of our Lord the now King, and ſailing under the colours of our Lord the now King, and the ſaid pilchards then and there being the property of the Plaintiff, who then and there was a ſubject of our Lord the now King,) was then and there prevented from purſuing her voyage to *Naples* aforeſaid, and the ſaid voyage was thereby then and there totally defeated and loſt, and the ſaid pilchards then and there became and were of no value to the Plaintiff, to wit, at, &c. whereof the Defendant afterwards, to wit, on, &c. had notice."

The cauſe was tried before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after *Michaelmas* term, when it appeared that the *Paxaro* on the 19th of *October* 1800 took in a cargo of pilchards at *Penzance*, with which ſhe proceeded to *Falmouth* in order to join convoy; that on the 24th of *January* 1801 ſhe ſailed from *Falmouth* under convoy of the *Seahorſe*; that after having met with much bad weather ſhe put in to *Liſbon*, by order of the commodore, on the 18th of *February*; that ſhe ſailed again from *Liſbon* on the 2d of *March*, and on the 5th received intelligence that *Engliſh* veſſels were excluded from all the ports belonging to the king of *Naples*; that on the 16th the maſters were called on board the *Seahorſe*, and thoſe who were deſtined for *Naples* and *Sicily* received orders from the commodore not to proceed to their deſtinations, but to make *Port Mahon* in *Minorca*, in order to get further intelligence; that on the 25th the *Paxaro* arrived at *Port Mahon*, where the report reſpecting the ſtate of the port of *Naples* was confirmed; that in conſequence of this, a ſurvey was taken of the cargo under the directions of the Vice-Admiralty Court at *Minorca*, and the cargo was afterwards ſold by public auction, purſuant to the order of that Court, for a very ſmall ſum of money; that in conſequence of intelligence having been received in this country of the treaty between the Republic of *France* and the King of *Naples*, by which veſſels under *Britiſh* colours were to be excluded from all ports in the dominions of the King of *Naples*, the Plaintiff, on the 23d of *April*, gave notice of abandonment to the underwriters, which the latter refuſed to accept; and that as ſoon as the Plaintiff was informed of the ſale at *Port Mahon*, he communicated all

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the papers to the underwriters, and demanded payment for a total loſs. The jury found a verdict for the Defendant. A rule having been obtained in *Hilary* term calling on the Defendant to ſhew cauſe why the verdict ſhould not be ſet aſide and a new trial granted,

Beſt Serjt. ſhewed cauſe. This is an attempt by a ſale of the cargo at *Minorca* to create a total loſs; whereas if the cargo had proceeded to its port of deſtination it would have been worth nothing, and yet the aſſured would not have been entitled to recover. Indeed the motives which influenced the conduct of the aſſured are plainly demonſtrated by the facts in evidence; for before they had received information of the ſituation of the cargo, they gave notice of abandonment, becauſe they underſtood that the ports of *Naples* would be ſhut. But in *Hamilton* v. *Mendez*, 2 *Burr.* 1198. Lord *Mansfield* expreſsly lays it down that an aſſured cannot elect to abandon before advice is received of the loſs. Now in this caſe the only regular notice of abandonment was given previous to any advice having been received of the loſs: and though the aſſured, after having received information of the ſale at *Port Mahon*, handed over the account ſales, together with the other papers, to the underwriters and demanded payment, yet as they did not ſpecifically ſtate their intention to transfer their intereſt to the underwriters, ſuch communication did not amount to a notice of abandonment (*a*).

Shepherd and *Bayley* Serjts. in ſupport of the rule. To entitle the aſſured to recover for a total loſs, it is not neceſſary that the goods ſhould either be actually deſtroyed, or taken out of the poſſeſſion of the owners. It is ſufficient if they are prevented from arriving at their place of deſtination by any of the perils inſured againſt. The underwriter in this caſe contracted that the cargo ſhould be carried in ſafety from *Mounts Bay* to *Naples*, notwithſtanding the reſtraint of princes. And it is impoſſible to contend that the *Paxaro* was not as much prevented from proceeding to *Naples* by the reſtraint of princes as if ſhe had actually been detained by the government of an intermediate port, ſince ſhe could not fail into *Naples* without rendering herſelf liable to immediate confiſcation. Suppoſe ſhe had been detained at *Port Mahon* by

(*a*) After the argument of Mr. Serj. *Beſt* the Court intimated to the other ſide that according to the caſe of *Roole* v. *Fitzgerald*, *Wills*, 641. the loſs averred in this declaration was not ſuch as the aſſured could recover upon, being only a loſs of the voyage; and therefore, to avoid further argument, directed them to addreſs themſelves to that point.

embargo

embargo or by ſtreſs of weather, and in conſequence of the deterioration of the cargo the captain had been obliged to ſell there; the object of the voyage having been deſtroyed by perils within the policy, the underwriters muſt have been reſponſible. In the caſe of *Goſs* v. *Withers*, 2 *Burr.* 683., which was an inſurance upon fiſh, the aſſured was allowed to abandon and recover for a total loſs, though the ſhip had been recaptured, and the cargo remained in ſpecie at *Milford Haven*. The only ground upon which the Court could have determined that the loſs was total, muſt have been that the voyage was defeated. Lord *Mansfield* ſays, "The diſability to purſue the voyage ſtill continued;" and in another place, p. 697. he cites *Le Guidon* to prove that a right to abandon ariſes, not only upon a capture, but "any other ſuch diſturbance as defeats the voyage, or makes it not worth while or worth the freight to purſue it." And in *Cazalet* v. *St. Barbe*, 1 *T. R.* 187. Mr. Juſtice *Buller* ſays, that the policy "is an inſurance on the ſhip for the voyage." In *M'Andrews* v. *Vaughan*, *Park's Inſur.* 115. Lord *Mansfield* ſays, that either the voyage muſt be loſt or the cargo deſtroyed; and to the ſame effect is his language in *Milles* v. *Fletcher*, *Doug.* 231. The caſe of *Manning* v. *Newnham*, *Park's Inſur.* 168. is deciſive. That was an inſurance from *Tortola* to *London* upon ſhip, freight, and goods, warranted free from particular average. The ſhip, ſoon after leaving *Tortola*, was ſo much damaged by ſtormy weather that ſhe was obliged to put back, and it being found upon ſurvey that ſhe was incapable of proceeding with her cargo to *London*, the ſhip and cargo were ſold, and an action brought againſt the underwriters for a total loſs. Lord *Mansfield*, in delivering his opinion, ſays, "If by a peril inſured the voyage is loſt it is a total loſs; otherwiſe not:" and again, "It is a contract of indemnity, and the inſurance is that the ſhip ſhall come to *London*." With reſpect to the caſe of *Pole* v. *Fitzgerald*, *Willes*, 641., which was an inſurance upon a ſhip for four months, bound upon a cruiſing voyage, with a warranty againſt all average, though the cruiſing was prevented by one of the perils within the policy, yet the ſhip was in ſafety at the end of the four months; which was equivalent to an arrival at the deſtined port, where the inſurance, inſtead of being for a certain time, is to a particular port. Admitting that the firſt notice of abandonment was premature, yet when intelligence arrived of thoſe circumſtances which entitled the Plaintiff to claim payment for a total loſs, it was ſufficient for him

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to demand such payment, without giving a fresh notice of abandonment. In the cases where the want of a notice of abandonment has precluded the assured from recovering, the assured has neglected to make his election sufficiently early; whereas in the present case the Plaintiff made his election and gave notice to the underwriters upon the first receipt of the intelligence respecting the state of the ports of *Naples*.

Cur. adv. vult.

The opinion of the Court was this day delivered by

Lord ALVANLEY Ch. J. The question for our determination is, Whether the circumstances which have happened amount to a total loss within the policy? The policy includes capture and detention of princes, and any loss which necessarily arises from such acts is a loss within the policy. But it has appeared to me that where underwriters have insured against capture and restraint of princes, and the captain, learning that if he enter the port of his destination the vessel will be lost by confiscation, avoids that port, whereby the object of the voyage is defeated, such circumstances do not amount to a peril operating to the total destruction of the thing insured. If they could, the same principle would have applied in case information had been received at *Falmouth* that the ship could not safely proceed to *Naples*. In *Goss* v. *Withers*, *Hamilton* v. *Mendez*, and *Milles* v. *Fletcher*, the principles by which a total loss is to be ascertained are clearly laid down. It is there said, "that if the voyage be lost or not worth pursuing, if the salvage be high, if farther expence be necessary, if the insured will not at all events undertake to pay that expence, &c. the insured may abandon, notwithstanding a re-capture." But the doctrine thus laid down is only applicable to cases in which the loss is occasioned by a peril insured against; which, as it appears to me, must be a peril acting upon the subject insured immediately, and not circuitously, as in the present case. Without entering, therefore, at present into the question which has arisen in another case (*a*), how far what has happened can be considered as a total destruction of the thing insured, I think that the detention of the cargo on board the ship at a neutral port in consequence of the danger of entering the port of destination cannot create a total loss within the meaning of the policy, because it does not arise from a peril insured

(*a*) *Dyson* v. *Rowcroft*. See *post*, *Trin.* Term.

against.

againſt. This is an inſurance upon an article from *England* to *Naples*, warranted free from particular average. The Plaintiff therefore cannot recover, unleſs the article be totally loſt by a peril within the policy; and ſuch peril muſt, as I think, act directly and not collaterally upon the thing inſured. I much doubt whether if a verdict had been found for the Plaintiff, judgment might not have been arreſted. With reſpect to the caſe of *Manning* v. *Newnham* it may be obſerved, that Lord *Mansfield* expreſsly decides it upon the ground of the voyage being loſt by one of the perils inſured againſt, namely, by tempeſtuous weather. The words of Lord *Kenyon* in *M'Andrews* v. *Vaughan*, in which he lays down that the inſured may recover for a total loſs if the voyage be loſt, muſt be taken with reference to the caſe before him, in which the injury aroſe from capture. The caſe of *Cocking* v. *Fraſer*, *Park's Inſur.* 114. is an extremely ſtrong authority to ſhew that if the article inſured (being one of thoſe mentioned in the memorandum) remain in ſpecie, the aſſured cannot recover, though it be rendered totally uſeleſs, and never reach the port of deſtination. But that caſe did not involve the queſtion upon which this caſe turns, namely, Whether the loſs were occaſioned by a riſk within the policy? Here, without entering into the queſtion how far the cargo was totally loſt, the claim made by the aſſured ariſes from the ſhip not proceeding to that port to which ſhe was deſtined. Had ſhe proceeded to *Naples* the loſs inſured againſt might have ariſen. If we were to decide that the ſale at *Port Mahon* was a total loſs within the policy, it would afford to owners inſuring cargoes of the deſcription ſpecified in the memorandum the opportunity of creating imaginary dangers whenever the cargo was not likely to reach the port of deſtination in a ſound ſtate, and, by giving notice of abandonment, to throw a loſs upon the underwriters to which they are not liable by the terms of the policy. We are therefore of opinion that the verdict was right.

HARRISON v. ROBINSON.

Per Curiam, Rule diſcharged.

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SHARPE *v.* IFFGRAVE.

An insolvent discharged under the 41 *Geo.* 3. *c.* 70. cannot be holden to bail on a bill drawn and indorsed over by him previous to the 1st of *March* 1803, though not due till after that period.

THIS was an application by the Defendant to be discharged out of the custody of the sheriff of *Middlesex*, because the debt for which he had been arrested in this action accrued previous to his discharge under an insolvent act.

The circumstances of the case were as follow: On the 24th of *February* 1801, the Defendant drew a bill of exchange (upon which he was now in custody), payable to his own order two months after date, which was accepted by one *Godfrey*, and by him indorsed to the Plaintiff before the 1st of *March* in the same year, who indorsed it over: when the bill became due the Plaintiff paid it to the then holder. On the 1st of *March* 1801, the statute 41 *Geo.* 3. *c.* 70. passed, under which the Defendant was discharged as an insolvent. The 34th section of that act provides that no person entitled to the benefit of that act shall at any time thereafter be imprisoned by reason of any judgment or decree obtained for payment of money, "or for any debt, bond, damages, contempts for non-payment of money, costs, sum or sums of money *contracted, incurred, occasioned, owing or growing due*, before the 1st of *March* 1801," and empowers the Judges of the court out of which the process issues to discharge any such person, if arrested, and to award him reasonable costs.

Best Serjt. in support of the rule now insisted, that as the bill was indorsed to the Plaintiff before the 1st of *March* 1801, though it was not till after that time that he was obliged to pay the amount to his indorsee, the Defendant was protected by the words of the 34th section of the act, which discharges persons taking the benefit of that act, not only from all debts due before the 1st of *March*, but also from all demands occasioned by engagements entered into before that time. He observed, that in cases of bankruptcy, it was undoubtedly true that the bankrupt was not discharged by his certificate, unless the person calling upon him had been so far damnified before the bankruptcy as to have had a right to prove under the commission: but that those cases had always been considered peculiarly hard upon the bankrupt, and therefore the Court would not extend the rule to the present case in opposition to the words and plain intent of the legislature to dis-

charge

charge the perſons of inſolvents from all cauſes of action ariſi upon contracts made before the paſſing of the act. He added, that the caſe of *Howis* v. *Wiggins*, 4 *T. R.* 714. had been much doubted (*a*), and urged that as the Defendant's perſon only was diſcharged by this act, that circumſtance ought to induce the Court to put a favourable conſtruction upon its proviſions.

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Vaughan Serjt. *contrà*, inſiſted that even the word "occaſioned" could not operate to diſcharge the Defendant, becauſe, the engagement being merely conditional, no debt was occaſioned to him until default had been made by the acceptor, which was not until after the 1ſt of *March*.

The Court ſaid, they ſhould take the opinion of the other Judges upon this point, as it was of importance that an uniform conſtruction ſhould prevail upon the ſubject.

And on this day they ſaid, that as the bill was drawn and indorſed before the 1ſt of *March*, that was the contract upon which the Debt aroſe, and conſequently the liability of the Defendant was occaſioned by that engagement.

Rule abſolute.

(*a*) See the opinions of Mr. Juſtice *Lawrence* and Mr. Juſtice *Groſe*, in *Cowley* v. *Dunlop*, 7 *T. R. p.* 565.

GRAY and Another *v.* SIDNEFF.

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No addition having been given to the Defendant either in the recital of the writ or in the ſubſequent part of the declaration, the Defendant pleaded the ſtatute of additions 1 *H.* 5. in abatement, and prayed judgment of the declaration. The Court held the plea a nullity, and gave leave to the plaintiff to ſign judgment.

THE declaration in this caſe was as follows: "*London*, to wit. *Simeon Sidneff* was attached to anſwer *George Gray* and *John Gray* in a plea of treſpaſs on the caſe: and whereupon the ſaid *George* and *John* by *T. L.* their attorney complain, that whereas the ſaid *Simeon*," &c. (proceeding with the common counts in *indebitatus aſſumpſit*).

The Defendant pleaded thus: "And the ſaid *Simeon* in his own proper perſon comes and prays judgment of the ſaid declaration, becauſe, he ſays, that by a certain act of parliament made and paſſed at the parliament holden at *Weſtminſter* in the third week of *Eaſter*, in the firſt year of the reign of our late Sovereign Lord *Henry* the Fifth, late King of *England*, it was (amongſt other things) ordained and eſtabliſhed, That in every original writ of actions, perſonals, appeals, and indictments, and in which the

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exigent ſhould be awarded in the names of the Defendants, in ſuch writs, original appeals, and indictments, additions ſhould be made of their eſtate or degree or myſtery, and of the towns or hamlets or places and counties of the which they were or be, or in which they be or were converſant; and if by proceſs upon the ſaid original writs, appeals, or indictments, in the which the ſaid addition be omitted, any utlagaries be pronounced, that they be void, fruſtrate, and holden for none; and that before the utlagaries pronounced, the ſaid writs and indictments ſhall be abated by the exception of the party where in the ſame the ſaid additions be omitted: Wherefore, inaſmuch as in the name of him the ſaid *Simeon* addition is not above made of his eſtate or degree or myſtery, he the ſaid *Simeon* prays judgment of the ſaid declarator, and that the ſame be quaſhed," &c. A rule *niſi* having been obtained, calling on the Defendant to ſhew cauſe why the Plaintiff ſhould not be at liberty to ſign judgment as for want of a plea,

Williams Serjt. now ſhewed cauſe. It muſt be admitted that the 1 *H.* 5. *c.* 5. is ſtill in force, for there are many pleas framed upon that ſtatute to be found in *Raſtall*, *Cliff*, and *Lilly*, tit. *Abatement*. So in *Bennett* v. *Purcell*, 2 *Ld. Raym.* 849. it was held by *Holt* Ch. J. that upon original where proceſs of outlawry lies, the addition muſt be given becauſe required by the ſtat. of *H.* 5. A plea therefore which is founded on that ſtatute cannot be treated as a nullity. If it be ſaid that the only way by which the Defendant can take advantage of the want of addition is by pleading in abatement as for a variance between the writ and the declaration, it may be obſerved that the preſumption is, that the declaration does not vary from the writ till the contrary is ſhewn. *Earl of Banbury* v. *Wood*, 1 *Salk.* 5. If ſo, the writ in this caſe muſt be preſumed to be defective, becauſe the declaration is defective, and being in the Common Pleas is neceſſarily founded on an original, and therefore within the rule laid down by *Holt* Ch. J. In 2 *Roll. R.* 225. *Johnſon*'s caſe, Ch. J. *Croke*, in arguing upon the neceſſity of an addition in an indictment, compares it to a declaration, in which he takes it for granted that an addition is neceſſary. Whether this plea be good or bad, the Court will not take upon themſelves to treat it as a nullity, becauſe that mode will deprive the Defendant of his writ of error upon the point on which the Court decide; if the Plaintiff chooſe to ſign judgment as for want of a plea, he will do it at his

his peril, but the Court will not ſanction that meaſure by acceding to this application. Indeed in *Shelly* v. *Wright*, *Barnes*, 338. a ſimilar application was refuſed, the Court obſerving that the Plaintiff might demur if he thought fit. It has alſo been objected, that this plea ſhould have been verified by affidavit, and that was one of the grounds upon which this application was made to the court. But the ſtatute of *Anne* (*a*), which requires an affidavit of matters pleaded in abatement, extends only to ſuch matters as are *debors* the record, and not to ſuch matters as will appear to the court upon inſpection of their own proceedings. *Hughes* v. *Alvarez*, 2 *Ld. Raym.* 1409. [The Court agreed to this, and expreſſed their opinion that no affidavit was neceſſary in this caſe.]

Bayley Serjt. in ſupport of the rule. The ſtatute of additions only requires that the Defendant's addition ſhall be inſerted in the writ, whereas the plea now before the court prays judgment, becauſe the addition of the Defendant is not inſerted in the declaration. The only object of the plea is to delay the Plaintiff, and if ſanctioned by the Court may be pleaded to every declaration now in the office; for it has not been the cuſtom to introduce the Defendant's addition into the declaration of late years, though formerly it was done. The Court however will not hold the objection valid without production of the writ. Indeed, in a caſe where a declaration began, "*A. B.* was attached to anſwer," inſtead of "ſummoned to anſwer," and the Defendant demurred on that ground, the Court of King's Bench ſaid they would not act upon the recital in the declaration, but would preſume that the proper proceſs was uſed, till the writ was produced and demonſtrated the contrary. In anſwer to the obſervation, that by acceding to this application the Court will deprive the Defendant of his writ of error, it is to be recollected that the ſame conſequence enſues in every caſe where judgment is ſigned as for want of a plea, on the ground of the plea being a nullity. Now there are many caſes in which the Court have granted ſimilar applications; as in *Cave* v. *Aaron*, 3 *Wilſ.* 33. where a plea of judgment recovered was ſet aſide becauſe pleaded after the Defendant had entered into terms to plead iſſuably. And the ſame has been done in the King's Bench with reſpect to a plea of the ſtatute of limitations at the time when that

(*a*) 4 *Ann.* c. 16. *ſ.* 11.

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plea was held not to be an iſſuable plea. [*Chambre* J. Can you cite any inſtance in which it has been done, unleſs where the party pleading the inſufficient plea has been under terms? The defect in this plea is ſubſtantial, and the proper mode of taking advantage of that defect is to demur.] In *Murray* v. *Hubbart*, *ante*, vol. 1. p. 645. a plea in abatement, ſtating a variance between the proceſs and the declaration, was treated as a nullity, and judgment ſigned accordingly; and yet in that caſe the Defendant was not under terms.

Williams in reply obſerved, that in *Murray* v. *Hubbert* the Court refuſed to ſanction an application for ſetting aſide the plea as a nullity, but put the Defendant to ſign judgment at his peril.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord ALVANLEY Ch. J. As this caſe has been argued upon the motion now before the Court, we do not think it right to withhold our judgment at preſent until the Plaintiff ſhall have done that which he now ſeeks our leave to do, though perhaps it would have been the more regular mode of proceeding for him to have ſigned judgment as for want of a plea without any application to the Court, and thus have put the Defendant to move to have that judgment ſet aſide. The plea in this caſe, after ſtating the ſtatute of additions, prays that the declaration may be quaſhed. I have not found a ſingle caſe in which it has been held neceſſary to inſert an addition in the declaration. The writ and declaration ought to agree, and formerly if there was any eſſential variance between them, advantage might have been taken of that circumſtance. It remains to be proved however that any repugnance exiſts in the preſent caſe. It never has been the practice for many years to inſert an addition in declarations in this Court, and the queſtion now is, Whether the plea which has been put in can be received? That queſtion appears to me to have been decided by the caſe of *Murray* v. *Hubbart*. There an application being made to the Court for leave to treat a plea in abatement as a nullity, the court refuſed to make any rule in that ſtage of the proceedings, but judgment having been ſigned as for want of a plea, the queſtion came before the Court, and was decided upon grounds which are extremely applicable to the preſent caſe. Lord Ch. J. *Eyre* there

lays,

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says, that "so long as it is the practice of the Court to issue the mesne process first, and to allow an original to be sued out afterwards, if necessary to substantiate the proceedings, no advantage can be taken after appearance of a misnomer in the mesne process." In that case the plea assumed, that the original writ had misnamed the Defendant, because the declaration recited that he was arrested by a different name from that by which he was declared against. It has long been the practice not to grant oyer of original writs; and though perhaps such refusal may be considered in the first instance to have been a strong measure, yet it was the necessary consequence of assuming a jurisdiction without original. From that moment it became necessary to treat all pleas of this sort as absolute nullities, otherwise the fiction under which the Court assumed its jurisdiction would have been turned into a mere engine of delay. When courts adopt a fiction they must necessarily support it. The Court of King's Bench would not allow a party to say that he was not in the custody of the marshal, nor the Court of Exchequer that he was not the King's debtor. By this doctrine no right is taken away from the subject, nor is he proceeded against in any way injurious to himself. If such a plea were to be allowed, the Master of the Rolls would issue a new writ agreeable to the declaration. If the Court thinks itself at liberty to proceed without an original, it will never permit a mode of proceeding to be adopted which will have the effect of compelling the Plaintiff to sue out that original which the Court feels itself justified in acting without. We think therefore that as the plea amounts to a mere nullity, the Plaintiff is at liberty to sign judgment for want of a plea.

Rule absolute.

DANN v. SPURRIER.

May 23d.

THE following case was sent by the Lord Chancellor for the opinion of this Court:

If a lease be granted for 7, 14 or 21 years, the lessee has the option at which of the above periods the lease shall determine.

The Defendant on the 14th *October* 1791 entered into the following agreement with one *William Atkinson*:

"*London*, 14th *October* 1791.

"Memorandum. I *William Atkinson* of *Saint Olaves*, *Southwark*, have this day agreed to take on lease of *John Spurrier* the

dwelling-

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houſe and premiſes now occupied by him in *Old Broad-ſtreet*, together with a bed-room now in the poſſeſſion of Mr. *Amory*, and which bed-room is over the one now uſed by the ſaid *John Spurrier* himſelf, to hold for 7, 14, or 21 years, at the yearly rent of one hundred and fifty pounds, payable half yearly, including all taxes which are to be paid by the ſaid *John Spurrier*, the term and rent to commence from *Chriſtmas* next, the uſual fixtures, carpets, and floor-cloths fitted to the floors, to be taken and paid for at a fair valuation by the ſaid *William Atkinſon*. An outſide door to be put to the kitchen entrance of the houſe at the expence of the ſaid *John Spurrier*." And on the back of the ſaid agreement is the following memorandum: "I agree to let the premiſes mentioned "on the other ſide hereof upon the terms and conditions expreſſed therein. *John Spurrier*." The ſaid *William Atkinſon* accordingly took poſſeſſion of the premiſes, and afterwards diſpoſed of his intereſt therein to the Plaintiff *Richard Dann*, who took poſſeſſion thereof and paid the rent.

The Defendant, on the 20th day of *June* 1798, duly gave notice to the Plaintiff to quit the premiſes at *Chriſtmas* then next, which he refuſed to do, alleging that the Defendant had no right to determine the agreement at the expiration of the firſt ſeven years, but that the tenant only had that right; in conſequence of which the Defendant, in *Hilary* term 1799, duly commenced an action of ejectment in the Court of King's Bench, in order to obtain poſſeſſion of the ſaid premiſes; upon which the Plaintiff and the ſaid *William Atkinſon*, in *Hilary* term 1799, filed a bill in the High Court of Chancery againſt the ſaid Defendant for a ſpecific performance of the ſaid agreement, and that the Defendant might be compelled to execute a leaſe of the premiſes to them or one of them for 21 years. The queſtion for the opinion of the Court was, Whether upon the legal conſtruction of the ſaid agreement the Defendant had a right to determine the term of 21 years, thereby agreed to be granted at the end of the firſt ſeven years?

Shepherd Serjt. for the Plaintiff. The queſtion to be conſidered in this caſe is preciſely the ſame as if a leaſe had actually been granted, and therefore it will be for the Court to decide, Whether, if a leaſe had been granted for 21 years, determinable at the end of ſeven or 14 years, ſuch leaſe would have been determinable at the option either of the leſſor or leſſee, or of the leſſee only? In *Goodright d. Hall* v. *Richardſon*, 3 *T. R.* 462. the Court of

King's Bench decided that a leaſe for three, ſix, or nine years, was a leaſe for nine years, determinable at the 3d or 6th year at the option of either party. During the argument a caſe of *Ferguſon* v. *Corniſh* was cited, as having been decided by Lord *Mansfield*, and in which it was ſuppoſed to have been doubted by him whether a leaſe for ſeven, 14, or 21 years, was not void for uncertainty after the ſeven years. But that was a miſtake; and indeed though the Court in *Goodright d. Hall* v. *Richardſon* intimated that the leaſe was determinable at the option of either party at the end of the 3d or 6th year, yet it is obſervable that any opinion on that point was extrajudicial, for the only point in diſpute was, Whether the leaſe was not void for more than three years? It is open, therefore, for me to contend that this ſpecies of leaſe is determinable at the option of the leſſee only; and indeed if that is not the conſtruction put upon it the proviſion will be wholly nugatory, inaſmuch as the leſſor, to whom ſuch an option is ſuppoſed to be reſerved, is in no better condition with than without it, becauſe he may always renew if he pleaſes. Beſides, ſuch words as theſe are to be conſtrued moſt favourably for the grantee. Indeed the plain intent of the proviſion is to encourage the leſſee to expend more money upon the premiſes than he would otherwiſe do. If, therefore, the intent of the parties can be fairly collected, that intent muſt prevail; and if no intent can be collected, then the leaſe muſt be conſtrued moſt ſtrongly againſt the leſſor.

Heywood Serjt. *contrà*. This queſtion ariſes not on a leaſe, but on an agreement for a leaſe. Indeed if it were in form a leaſe, ſtill the queſtion would occur, In whom the option of determining that leaſe is veſted? In anſwer to the obſervation, that the agreement is to be conſtrued moſt ſtrongly againſt the Defendant according to the common rule adopted in caſes of grantor and grantee, it is to be remembered, that the party applying the agreement is the Plaintiff, and that the undertaking being completely mutual, the analogy does not exiſt. It has been contended that unleſs the option of determining or continuing the leaſe be given to the leſſee ſolely the proviſion will be nugatory; but that mode of reaſoning is very fallacious, for at all events it ſaves the trouble and expence of a renewal, where both parties are inclined to renew. Tenancies at will are determinable at the option of either party; now the ſpecies of leaſe under conſideration of the Court is framed on an analogy to that ſpecies of holding, for though both parties are bound by their agreement up to a certain period, yet

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when that period arrives each may exercise his will whether the relation of landlord and tenant shall continue any longer, with this restriction only, that if they choose it should continue, it must then continue for another definite period. The case of *Goodright d. Hall* v. *Richardson*, though subject to the observation which has been made upon it, is nevertheless a very strong authority in favour of the Defendant, for Lord *Kenyon* says, "it was intended that this lease should take effect for three years at all events, and that it should be in the election of either of the parties to put an end to it at that time or at the end of six years, giving reasonable notice to the other. It is like a lease for a year, and so from year to year, where, if the lessee wish to determine it at the end of the year, he must give reasonable notice to the other party."

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord ALVANLEY Ch. J. This question turns upon the legal construction of the agreement stated in the case. It is to be observed, that the agreement is not an offer on the part of the lessee to take a lease for seven or a lease for 14, or a lease for 21 years, but it is an offer to take a lease with an *habendum*, as stated by the lessee in his proposals, *viz.* to hold for seven, 14, or 21 years. The lessor having assented to let the premises upon the terms and conditions proposed, it must now be taken as if a lease had been actually granted containing such an *habendum* as that stated in the proposals. It is for us, therefore, to determine what is the legal construction of such an *habendum* in a lease. It has been contended that where the terms are not defined, either positively or by any circumstance, but an alternative is stated which cannot be made certain without the option of one of the parties, the lease is determinable at the option of either. There seems to be great authority for such a proposition, for undoubtedly Lord *Kenyon* and Mr. Justice *Buller* both intimate in the case of *Goodright d. Richardson* v. *Hall*, that the option would be in either party. But it must not be forgotten (for I wish it to be understood that had the judgment of the Court in that case proceeded upon the point alluded to, it would probably have guided our judgment in the construction of such doubtful words as those which occur in this case) that Lord *Kenyon* and Mr. Justice *Buller* only threw out their opinion *obiter*; had it been otherwise, there are no authorities, particularly that

that of Lord *Kenyon*, upon a point of law arising out of real property, to which I should be more disposed to defer. The lease in that case was for three, six, or nine years, determinable in the years 1788, 1791, and 1794, and the construction put upon that lease lease was, that it gave an option to either party, but that such option must be exercised with reasonable notice previous to the expiration of any of the terms; and as reasonable notice had not been given, the Court held that the lease was not determined. With respect to the case of *Ferguson* v. *Cornish*, there referred to, it is surprising that any doubt should have arisen; and indeed it does not appear that any doubt was entertained by the Court. A lease having been granted for seven, 14, or 21 years, and an action of covenant having been brought against the lessee during the first seven years, it was contended by the lessee that it was no lease at all, according to the old doctrine, that a lease uncertain in its commencement or duration was void. Lord *Mansfield* held, that at all events it was a good lease for seven years. These two cases decide nothing with respect to the point now before the Court. It remains therefore for us to consider, notwithstanding the opinions thrown out in these cases, Whether, according to the construction which deeds between lessor and lessee have received, the power of determining the lease in this case must not be confined to the lessee? Much is to be found in the books relative to the construction of deeds which contain covenants in the alternative; from all of which the rule appears to be perfectly clear, that if a doubt arise as to the construction of a lease between lessor and lessee, the lease must be construed most beneficially for the latter. It is laid down in the books, that if a man covenant to do one of two things, and he does either, the covenant is not broken. Thus in 1 *Roll. Abr.* tit. *Condition*, (Y), *pl.* 3. *fo.* 446., it is said that if a condition be that the obligor shall enfeoff a man of lands in *D.* or *S.* upon request, the obligor has his election of which of the two he shall enfeoff him. So in *pl.* 4. it is laid down that if the condition be that the obligor shall pay 20*l.* or a pint of wine upon request, he has his election. This election, however, is said to depend upon which of the two parties to the contract is to do the first act. Therefore, if a man make a grant in the alternative, and the grantee enter into possession, the grantor is no longer at liberty to exercise an option. So if *A.* says to *B.*, I grant you a horse out of my stable, he puts it in the power of *B.* to take which horse he shall think

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think proper. In the Biſhop *Bath's* caſe, 6 *Co.* 35. *b.*, it was reſolved that the conſtruction of law as to the commencement of leaſes ſhould be taken ſtrongeſt againſt the leſſor, and moſt beneficially for the leſſee. Another ſtrong authority to this effect is Sir *Rowland Heywood's* caſe, 2 *Co.* 35. *a.*, where one having demiſed, granted, bargained, and ſold certain lands, and the queſtion being, Whether the grantee ſhould take by demiſe or by bargain and ſale? it was held that the grantee had his election. In *Dyer*, 261. *b.* the Court of Common Pleas held that where a leaſe of premiſes, which had been granted for 31 years, was granted to a new leſſee, a *die confectionis præſentium termino prædicto finito uſque ad finem termini* 31 *annorum tunc immediate ſequentium*, that the term ſhould commence in poſſeſſion from the end of the former term, and not from the making of the deed, and the reaſon which they give for the opinion is, that every grant ſhall be expounded moſt favourably for the grantee, and if the leaſe were to commence from the making of the deed the leſſee would only have four years. It is true that *Brown* doubted upon this point, and that the Court of King's Bench came to a different deciſion. But although the Court of King's Bench might not think proper to go ſo far in favour of the leſſee as the Court of Common Pleas did, yet it does not follow that they were diſpoſed to deny the rule of conſtruing leaſes favourably for the leſſee; for where two periods are mentioned in a deed, from which the commencement of a leaſe is to take place, the legal conſtruction is, that it ſhall commence from which of the two periods ſhall firſt happen; and ſo it was determined in *Dyer*, 312. *b. in marg.* This principle of expoſition is ſound; but it is not applicable to this caſe, which does not depend upon the priority of different periods, but upon the queſtion, In whom the option of deciding upon the alternative is veſted? The leaſe agreed for in the preſent caſe was for ſeven, 14, or 21 years. An option therefore was certainly intended. If then the principle be juſt, that a leaſe is to be conſtrued moſt favourably for the leſſee, why are we to determine in this inſtance that the option is in the leſſor? If indeed a proviſion had been inſerted that the leaſe ſhould be determinable at the option of either party, the leſſor would have been entitled to take advantage of it; but where no ſuch proviſo is inſerted, the true conſtruction ſeems to be that the leſſee is entitled, at his option, to take that term which is moſt beneficial to himſelf. Notwithſtanding, therefore, the opinions which have been referred to

of Lord *Kenyon* and Mr. Juſtice *Buller*, we think that where no cuſtom of the country exiſts upon the ſubject, the principle of conſtruing deeds between leſſor and leſſee requires us to hold, that where a grant is made in an alternative which cannot be determined by extrinſic circumſtances, the option is left in the leſſee. And we ſhall certify accordingly. There is a caſe of *Keble* v. *Hall*, *Litt.* 363. 370., which bears very ſtrongly upon this ſubject. In that caſe, a leaſe having been granted to *A.* and *B.* for forty years if they and three others, or any of them, ſhould ſo long live; a ſecond leaſe was granted "*habendum* from the adminiſtration (*a*), which ſhould be in the year 1568, or from and after the ſurrender, forfeiture, or other determination of the ſaid leaſe to *A.* and *B.*;" and ſome of the perſons for whoſe life the firſt leaſe was granted having ſurvived the year 1568, a queſtion aroſe when the ſecond leaſe ought to commence. The caſe indeed does not appear by the report to have been finally determined, but the Court ſtrongly inclined to think the leſſee ſhould have his election, becauſe that conſtruction ought to be adopted which is moſt favourable for leſſees.

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(*a*) This ſeems to be miſprinted in *Litt.* for Annunciation.

BEALE *v.* THOMPSON.

May 23d.

Qu. whether the crews of the *Britiſh* ſhips detained in *Ruſſia* under the orders of the *Ruſſian* Government in the year 1800 were entitled to wages for the time during which the ſhips were ſo detained?

ASSUMPSIT for wages due to the Plaintiff as a mariner on board the *Iſabella*, on a voyage from the port of *London* to *Peterſburgh*, and from *Peterſburgh* back to *London*, at 5*l.* *per* month. The declaration alleged the ſafe arrival of the *Iſabella* at *Peterſburgh*, and her return from thence to *London*, "during the whole of which ſaid voyage the Plaintiff continued and remained in and on board the ſaid ſhip, in the ſervice of the ſaid Defendant as ſuch ſeaman and mariner as aforeſaid." There were alſo counts for wages as a ſeaman, on a *quantum meruit*, for money paid, laid out, and expended, for money had and received, and on account ſtated.

The cauſe was tried before Lord *Alvanley* Ch. J. at the *Weſtminſter* Sittings after laſt *Michaelmas* term, when the following

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ſpecial verdict was found. The Plaintiff, a *Britiſh* (*a*) ſeaman, on the 14th day of *July* 1800, executed articles to ſerve as a ſeaman in a *Britiſh* ſhip called the *Iſabella*, of which the Defendant was maſter, at the wages of 5 *l. per* month, on a voyage from *London* to *Peterſburgh*, and from thence to *London*, and that in conſideration of the ſaid monthly wages the Plaintiff ſhould and would perform the above mentioned voyage; and the Defendant did hire the Plaintiff for the ſaid voyage, at ſuch monthly wages, to be paid purſuant to the laws of *Great Britain*; and the Plaintiff did promiſe and oblige himſelf to do his duty and obey the lawful commands of the officers on board the ſaid ſhip or boats thereunto belonging as became a good and faithful ſeaman and mariner, and at all places where the ſaid ſhip ſhould put in or anchor at during the ſaid voyage to do his beſt endeavours for the preſervation of the ſaid ſhip and cargo, and not to neglect or refuſe doing his duty by day or night, nor go out of the ſaid ſhip on board any other veſſel, or be on ſhore under any pretence whatſoever till the voyage ſhould be ended and the ſhip diſcharged of her cargo, without leave firſt obtained of the maſter, captain, or commanding officer on board; and in default thereof it was agreed that he ſhould be liable to the penalties mentioned in the 2 *Geo.* 2. *c.* 36. and the 37 *Geo.* 3. *c.* 73.; and further that 24 hours' abſence without leave ſhould be deemed a total deſertion, and render the Plaintiff liable to the forfeitures and penalties contained in the acts above recited; and alſo that the Plaintiff ſhould not demand or be entitled to his wages, or any part thereof, until the arrival of the ſaid ſhip at the above mentioned port of diſcharge, and her cargo delivered; and that if the Plaintiff ſhould well and truly perform the above mentioned voyage he ſhould be entitled to the wages or hire that ſhould become due to him purſuant to the ſaid articles. The Plaintiff accordingly ſailed on board the ſaid ſhip, which arrived at *Peterſburgh* on or about the 18th day of *October* in the ſame year, and continued there in proſecution of the purpoſe of the voyage until the 5th day of *November* following, on which day the following order was iſſued by the *Ruſſian* Government: "Whereas we have learned that the iſland of *Malta*, lately in the poſſeſſion of the *Hercule*, has

(*a*) There was a ſimilar ſpecial verdict found in a caſe of *Johnſon* v. *Broderick*, with this only difference, that the Plaintiff there was a foreign ſeaman. Both ſpecial verdicts were argued and decided together.

been ſurrendered to the *Engliſh* troops; but as yet it is uncertain whether the agreement entered into on the 30th *December* 1798 will be fulfilled, according to which this iſland, after its capture, is to be reſtored to the order of *Saint John* of *Jeruſalem*, of which His Majeſty the Emperor of all the *Ruſſias* is Grand Maſter, His Imperial Majeſty being determined to defend his rights, has been pleaſed to command that an embargo ſhall be laid on all *Engliſh* ſhips in the ports of his empire till the above-mentioned convention ſhall be fulfilled." After this order guards were placed along the ſhore to prevent the crews from eſcaping from their reſpective ſhips until the 10th of the ſame month of *November*, when ſuch part of the crew of each ſhip as were *Britiſh* ſubjects were taken out by a *Ruſſian* guard and marched into the interior of the country, and the foreign ſeamen, being claimed by their conſuls, were put on ſhore and ſet at liberty. On the 18th and 21ſt days of the ſaid month of *November*, the following proclamations appeared in the *Peterſburgh Court Gazette*: "The crews of the two *Engliſh* ſhips in the harbour of *Narva*, on the arrival of a military force to put them under arreſt, in conſequence of the embargo laid on them, having made reſiſtance, fired piſtols, and forced a *Ruſſian* ſailor into the water, and afterwards weighed anchor and ſailed away; his Imperial Majeſty has been pleaſed to order that the remainder of the veſſels in that harbour ſhall be burned." "His Imperial Majeſty having received from his Chamberlain *Stalinſkoi* at *Palermo*, an account of the taking of *Malta*, has been pleaſed to direct that the following note ſhall be tranſmitted to all the Diplomatic Corps reſiding at his Court by the Miniſters preſiding in the College for Foreign Affairs, Count *Rotoptſkin* and the Vice Chancellor Count *Panin*:—His Majeſty the Emperor of all the *Ruſſias* has received circumſtantial accounts reſpecting the ſurrender of *Malta*, by which it is actually confirmed that the *Engliſh* generals, notwithſtanding the repeated remonſtrances on the part of His Majeſty's Miniſters at *Palermo*, as well as from the Miniſtry of His *Sicilian* Majeſty, have taken poſſeſſion of *Valetta*, and of the iſland of *Malta*, in the name of the King of *Great Britain*, and have hoiſted his flag only. His Imperial Majeſty's juſt indignation having been raiſed by this violation of good confidence, he has reſolved not to take off the embargo that has been laid on all *Engliſh* veſſels in the *Ruſſian* ports until the agreement of the convention

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vention concluded in 1798 ſhall have been completely carried into execution." On the 14th of *January* 1801 His *Britannic* Majeſty in Council iſſued the following order: "Whereas His Majeſty has received advice that a large number of veſſels belonging to His Majeſty's ſubjects have been and are detained in the ports of *Ruſſia*, and that the *Britiſh* ſailors navigating the ſame have been and are detained as priſoners in different parts of *Ruſſia*, and alſo that during the continuance of theſe proceedings a dangerous confederacy of a hoſtile nature againſt the juſt rights and intereſt of His Majeſty and his dominions has been entered into with the Court of *Saint Peterſburgh* by the Courts of *Denmark* and *Sweden* reſpectively, His Majeſty, with the advice of his Privy Council, is thereupon pleaſed to order, as it is hereby ordered, that no ſhips or veſſels belonging to any of His Majeſty's ſubjects be permitted to enter and clear out for any of the ports of *Ruſſia*, *Denmark*, or *Sweden*, until further order. And His Majeſty is further pleaſed to order, that a general embargo or ſtop be made of all *Ruſſian*, *Daniſh*, and *Swediſh* ſhips and veſſels whatſoever now within or which hereafter ſhall come into any of the ports, harbours, or roads, within the united kingdom of *Great Britain* and *Ireland*, together with all perſons and effects on board of the ſaid ſhips and veſſels; but that the utmoſt care be taken for the preſervation of all and every part of the cargoes on board any of the ſaid ſhips and veſſels, ſo that no damage or embezzlement whatever be ſuſtained; and the Right Honorable the Lords Commiſſioners of His Majeſty's Treaſury, the Lords Commiſſioners of the Admiralty, and the Lord Warden of the Cinque Ports, are to give the neceſſary direction herein as to them reſpectively appertain." On the 16th of *January* 1801 His *Britannic* Majeſty in Council iſſued the following order: "Whereas His Majeſty has received advice that a large number of veſſels belonging to His Majeſty's ſubjects have been and are detained in the ports of *Ruſſia*, and that the property of His Majeſty's ſubjects in *Ruſſia* has, by virtue of ſeveral orders and decrees of the *Ruſſian* Government, particularly one bearing date the 29th of *November* laſt Old Stile, (corresponding with the 10th of *December* New Stile,) been ſeized and directed to be applied in violation of the principles of juſtice and of the rights of the ſeveral perſons intereſted therein, His Majeſty, with the advice of his Privy

Council, is thereupon pleaſed to order, as it is hereby ordered, that no bills drawn ſince the ſaid 29th of *November* Old Stile (correſponding with the 10th of *December* New Stile,) by or on behalf of any perſons being ſubjects of or reſiding in the dominions of the Emperor of *Ruſſia*, ſhall be accepted or paid without licence from one of His Majeſty's Principal Secretaries of State firſt had in that behalf, until further ſignification of His Majeſty's pleaſure, or until proviſion ſhall be made in reſpect thereof by act of parliament; whereof all perſons concerned are to take notice, and govern themſelves accordingly." The captain and the *Britiſh* crew of the *Iſabella* remained up the country till the 28th of *May* in the ſucceeding year, during which time they were kept within certain bounds, and, from the time they were taken from their ſhips, were treated in other reſpects as if they had been priſoners of war. On the 28th of *May* in the ſucceeding year, the captain and ſuch of the crew as had been marched up the country, having returned on board the ſhip, the Plaintiff joined them and proceeded on the voyage to *London*. The ſhip ſailed to *Peterſburgh* in ballaſt, to bring a cargo from thence to *London*, and was to be paid freight for that cargo by the ton. The Plaintiff did his duty as a ſeaman on board the ſhip during the ſaid voyage, and the ſhip received the ſame freight as if ſhe had not been detained, and no more. After the captain and crew returned on board the ſaid ſhip, to wit, on the 5th *June* 1801 O. S., the *Ruſſian* Government iſſued the following order: "Quoique l'intention magnanime de S. M. l' Empereur de toutes les *Ruſſies* de rendre pleine et entière juſtice aux ſujets *Britanniques* qui ont eſſuyé des pertes pendant les troubles qui ont alteré la bonne intelligence entre ſon empire et la *Grande brétagne* ſoit deja conſtatée par les faits, S. M. I. ne conſultant que ſa loyauté a autoriſe encore le Plenipotentiaire ſouſſigné à declarer comme Il declare par la preſente: Que tous les navires, les marchandizes, et les proprietés des ſujets *Britaniques*, qui avaient été mis en ſequeſtre ſous le dernier regne in *Ruſſie*, ſeront non ſeulement fidelement reſtitués aux dits ſujets *Britanniques* ou à leurs commettans, mais que pour les effets qui auroient eté alienés d' une maniere quelconque, et qui ne pourraient plus être rendus en nature il ſera accordé aux proprietaires un equivalent convenable lequel ſera determiné ulterieurement d'apres les regles de l'équité. En foi de quoi nous plenipotentiaire de S. M. I. de toutes les

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Ruſſies avons ſigné la preſente declaration, et y avons fait apposer le ſceau de nos armes. Fait à *St. Peterſbourg* le $\frac{1}{7}$ *Juin* 1801. (Signé) Le Comte de *Parrin*." This order has not yet been carried into complete effect. No new articles were entered into between the captain and crew. The Plaintiff has received all his wages for the voyage according to the articles, except for the time the captain and crew were ſo kept out of the ſaid ſhip.

This ſpecial verdict was twice argued; firſt in *Hilary* term 1803, by *Lens* Serjt. for the Plaintiff, and *Bayley* Serjt. for the Defendant, and now in this term by *Cockell* Serjt. for the former, and *Marſhall* Serjt. for the latter.

Arguments for the Plaintiff. The only grounds upon which it can be contended that the Plaintiff ought not to receive wages for the whole time mentioned in the ſpecial verdict are, that the contract for wages was either extinguiſhed or ſuſpended by what took place in *Ruſſia*. If the act of the *Ruſſian* Government is to be conſidered as an embargo, it is clear that the contract for wages was neither extinguiſhed nor ſuſpended. The caſe of *Hadley* v. *Clarke*, 8 *T. R.* 259. expreſsly decides that an embargo does not extinguiſh a contract; and though the embargo in that caſe laſted two years, ſtill the parties were held liable upon the contract at the expiration of that period. No authority is to be found in contradiction of the law laid down in that caſe. It appears alſo from *Molloy*, *b.* 2. *c.* 2. *ſ.* 3. that freight is due and muſt be paid notwithſtanding an embargo. Now if freight be due, wages muſt alſo be due. It can make no difference that the freight was contracted for in this caſe at ſo much *per* ton, for if the voyage were put an end to in a caſe where the freight was payable by the month, all right to freight would equally be extinguiſhed. Lord *Kenyon*, in *Hadley* v. *Clarke*, when ſpeaking of the inconveniences which would ariſe from holding an embargo to amount to an extinguiſhment of a contract on a charter party, obſerves, that ſuch a doctrine would alſo have the effect of putting an end to all contracts for freight and for wages. Nor was the contract for wages ſuſpended; a contract entire in its nature cannot be ſuſpended and afterwards revived with all its conſequences and incidents. There is no inſtance, either in the law of *England* or in the law maritime, of ſuch a ſuſpenſion. In *Robertſon* v. *Ewer*, 1 *T. R.* 127. it was taken for granted that wages were due

due to the ſeamen during an embargo; for the only point conteſted in that caſe was, Whether the wages growing due during that period, and the proviſions expended, were covered by an inſurance on the body of the ſhip. Though the ſeamen during their detention in *Ruſſia* could not be actively employed, they were bound to wait until their ſervices ſhould be required; but if the embargo be held to ſuſpend the contract, that ſuſpenſion will operate to divide the contract and create an interval of an uncertain duration, in which the contract may be ſaid to be diſſolved *pro hac vice*, renewable whenever the embargo ſhall ceaſe. In ſuch caſe, are the ſeamen at liberty to enter into new engagements, and yet obliged to hold themſelves in readineſs at a future period to fulfil the remainder of the contract? All contracts for ſeamen's wages are regulated by the 2 *Geo.* 2. *c* 36. The principal object of that ſtatute was to prevent the deſertion of ſeamen in foreign parts, and to compel them to continue on board and fulfil their contract until the voyage was completed or defeated by capture, or other accident of that kind. Under the 3d ſection of that act the Plaintiff in this caſe would have been a deſerter, and have forfeited his wages, had he quitted the ſhip upon the embargo being laid on in *Ruſſia*. If a ſhip be captured, and afterwards recaptured, the contract is not determined, but the entire freight is due. *Molloy*, *b.* 2. *c.* 4. *ſ.* 13. The next queſtion is, Whether the act of the *Ruſſian* Government amounted to any thing more than embargo? An embargo is a temporary reſtraint, adopted for a particular purpoſe. The ſhips, cargoes, and ſeamen, are all taken into the cuſtody of the power which impoſes it. But the degree of rigour with which theſe circumſtances may be attended in any particular caſe will not alter the nature of the act. The eſſence of an embargo is that it ſhould be a reſtraint *quouſque*. It may or may not terminate in hoſtility. In the preſent caſe it never proceeded beyond an embargo, for reſtoration was made. The peculiarity of the embargo in queſtion was the hardſhip impoſed upon the ſeamen. But that circumſtance ought to have no operation upon the contract between the ſeamen and the owner, the latter of whom was not affected by that hardſhip. Indeed it would be a monſtrous propoſition to ſanction in a court of juſtice, that if the ſeamen are treated with extreme cruelty during the continuance of an embargo the contract between them and their owners ſhould be extinguiſhed, and they ſhould loſe their

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wages; but that if they were treated with humanity they ſhould be entitled to recover them. Nor can the period for which this embargo continued operate to invalidate the contract, ſince it was of leſs duration than that in *Hadley* v. *Clarke*. And it is to be obſerved, that the act of the *Ruſſian* is expreſsly ſtiled an embargo in the edict of the Emperor himſelf. It is not neceſſary to entitle a ſeaman to wages that he ſhould perſonally ſerve on board the ſhip, provided he do ſuch ſervices as the nature of the caſe will admit of; for in *Chandler* v. *Greives*, 2 *H. Bl.* 606. *in notis*, the Plaintiff recovered the whole of his wages, though, in conſequence of illneſs, he was put on ſhore at *Philadelphia*. What is to be found in *Valin* upon this ſubject is not founded upon any general rule of maritime law, but upon the particular ordinances of *France*, which were in many caſes made for the purpoſe of ſupplying defects in the general law. The caſes of the *Britiſh* and the foreign ſeamen muſt ſtand upon the ſame ground: for although one was impriſoned and the other not, and conſequently the latter had the actual power of leaving the country and entering into a new ſervice, yet in point of law they were both equally bound to wait for the termination of the embargo, and reſume their ſtations on board the ſhip whenever that event ſhould take place.

Arguments for the Defendant. The ſeizure ſtated in this ſpecial verdict amounts to a capture; and is not merely an embargo. But ſuppoſing it were an embargo, ſtill the Defendant is not entitled to wages for any longer period than while he ſerved on board. The term "embargo" is derived from a *Spaniſh* word, and in its original ſignification imports a prohibition of egreſs by public authority. The object of an embargo is either to prevent the ſhips of the power which impoſes it from falling into the hands of an enemy, or to detain the ſhips of foreigners. But an embargo operates merely by way of reſtraint, and the maſter and crew are left on board. The former retains the entire management of the ſhip, may land the cargo, diſcharge ſailors, and do any act but leave the port in which he is confined. In the preſent caſe, however, the ſhips were taken poſſeſſion of by an armed force, and were not merely reſtrained by the hand of the cuſtom-houſe intervening in a civil mode to prevent their egreſs. If it be ſaid that an embargo is an equivocal act, and muſt be determined by the motive which gives riſe to it, it may be obſerved, that the motive of the Court of *Ruſſia* can only

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be aſcertained by its acts; and thoſe acts form a very authentic expoſition of the motives under which the firſt poſſeſſion was taken. It appears that the crew were made priſoners, treated as priſoners, and marched up the country. It is clear that the conduct of *Ruſſia* was conſidered by the Government of this country as amounting to an act of hoſtility; for in the King's ſpeech of the 2d of *February* 1801 it is ſtated to be the commencement of a project by the three Northern Powers "to eſtabliſh a new code of maritime law, inconſiſtent with the rights and hoſtile to the intereſts of this country." A different mode of treatment was adopted towards *Britiſh* ſubjects from that which the ſubjects of other nations experienced: which clearly proves that the act was intended as a meaſure hoſtile to *Great Britain*. All foreign ſailors were ſet at liberty, and the *Britiſh* ſailor, if he could have eſcaped from his confinement, might have entered into a new contract, and was not bound to wait till the reſtriction ſhould be taken off, that being an event which might poſſibly never happen. Conſidering the conduct of *Ruſſia* then as an act of hoſtility, it diſſolved the relation between the maſter and mariner, and either determined the contract or ſuſpended its operation. In the caſe of *Curling* v. *Long*, *ante*, vol. 1. p. 637. Lord Ch. Juſtice *Eyre* conſidered a contract for freight as determined by a capture, though the ſhip were afterwards recaptured; and it appears from *Chandler* v. *Meade*, cited 2 *Ld. Raym.* 1211. that if a ſhip be captured and ranſomed, the mariner can only recover his wages *pro rata*, if indeed he can recover at all. In the caſe of capture and ranſom the ſeamen's wages are liable to contribute, and the ſame ſeems to be the caſe upon a capture and recapture. *Abbott on Merchant Ships and Seamen*, *part* 3. *c.* 8. *ſ.* 14. and *part* 4. *c.* 3. *ſ.* 2. Freight is due for the uſe of the ſhip, and wages for the ſervice of the mariners; but if the ſhip be taken by force out of the poſſeſſion of the owners, and the ſeamen are thereby prevented from performing any ſervice, neither freight nor wages can accrue. Suppoſing the detention, however, to have been a mere civil embargo, ſtill the Plaintiffs are not entitled to wages during their abſence from the ſhip. Wages are the reward of ſervice, and are payable for no longer time than the ſervice is performed. It is laid down in *Pothier*, tit. *Contrat de Louage*, *No.* 140. that if a perſon hire himſelf to a maſter, and is prevented from performing his ſervice by ſome power which he cannot reſiſt,

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no wages are due. The right to wages exiſts no longer than the relation of maſter and mariner ſubſiſts: the moment that is diſſolved the wages ceaſe, and whatever puts it out of the power of the mariner to perform his ſervice terminates that relation. Indeed there are caſes where the ſailor does not earn wages though the relation of maſter and mariner ſubſiſt; where freight is earned, wages are alſo earned; but where the ſhip earns no freight, the ſailor earns no wages. Thus in the *Marine Ordinances*, tit. *De l'Engagement des Mâtelots*, *Valin*, tom. 1. p. 688. 4to edit. 1766, and *Pothier*, tit. *Louage des Mâtelots*, No. 180. it is ſtated that where commerce is prohibited at the place of the ſhip's deſtination before the commencement of the voyage, the ſeaman ſhall be entitled to no wages; whether hired by the month or for the voyage, he ſhall be paid only for the days employed in fitting out the ſhip. If this prohibition happen during the voyage, he ſhall be paid in proportion to the time he has ſerved. And in article 5. of the *Marine Ordinances*, tit. *Louage des Mâtelots*, it is laid down that in caſe of an arreſt of princes before the voyage commenced, no wages will be due except for the days employed in fitting out. But if this be during the courſe of the voyage the wages of the ſailors engaged by the month ſhall run for half during the detention, while thoſe engaged for the voyage ſhall be paid according to agreement. The reaſon of theſe regulations was, that by the marine law the ſailor originally was entitled to nothing, and both *Pothier* and *Valin* treat the indulgence as an innovation. *Pothier* ſays, that the arreſt being by an irreſiſtible power the maſter cannot be reſponſible for it, according to the rule *caſus fortuiti à nemine præſtantur*. If the ſailor ſuffers by this delay, ſo do the maſter and owners of the ſhip. *Pothier*, tit. *Louage des Mâtelots*, No. 182. The obſervation of *Valin* is, that as to thoſe engaged by the month it would not be juſt that the owner, who gains no freight during the detention, ſhould pay the ſailors their full wages; and, on the other hand, it would not be reaſonable that the ſailors during the whole time of the detention ſhould do the duty of the ſhip for their victuals only. It was neceſſary, therefore, he obſerves, to adopt ſome modification; and of this the ſailor has no reaſon to complain. He indeed expreſſes his ſurprize that there ſhould be no regulation for the relief of a ſailor engaged at a ſpecific hire for the voyage. *Valin*, tom. 1. p. 690. The general rule with reſpect

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to freight is, that if it be by the month it does not run during a detention, whether that be at the beginning or in the courſe of the voyage; nor is it augmented if it be a ſpecific ſum. *Valin*, tom. 1. p. 627. The law laid down in the caſe of *Hadley* v. *Clarke* is not to be diſputed. There the embargo was only until further order of Council, and the Court determined that it ſuſpended, though it did not diſſolve the contract, notwithſtanding that it laſted two years. It is ſingular that any queſtion ſhould have ariſen there. But it cannot decide the preſent caſe, for it has already been ſhewn that the mere continuance of the contract of charter-party does not neceſſarily entitle the ſailor to wages.

Cur. adv. vult.

The learned Judges differing in opinion, delivered their ſentiments *ſeriatim* this day.

CHAMBRE J. Theſe are actions for mariners' wages; one of them is brought by a *Britiſh* ſeaman, the other is brought by a foreign ſeaman. But that circumſtance appears to me to make no material diſtinction between the two caſes, and therefore they have been argued as one caſe, without at all adverting, in the courſe of the argument, to that diſtinction. The queſtion that has been argued upon this ſpecial verdict is, Whether during the period in which the crews were put under the care of *Ruſſian* guards, and kept in a ſtate of confinement, any wages were earned by the mariners? It is contended, on the part of the Plaintiff, that they ought to recover inaſmuch as no fault has been committed by them; they ſay they have done their duty, and that the owners have earned and received their freight; that the act of the *Ruſſian* Government amounted to no more than an embargo, and was not a capture, and that an embargo is not a diſſolution or ſuſpention of the contract, either for freight or wages. On the other hand, the Defendants do not deny that wages were earned while the crews continued on board their reſpective ſhips, but they ſay it was not earned after the crews were taken out and marched up the country, and a ſeizure made of the ſhips and property on board; that this detention and impriſonment amounted to more than an embargo, that it was an hoſtile capture, which either ſuſpended or diſſolved the contract with the mariners. For the Plaintiff it has not, I think, been contended that if it was a capture any wages could be earned while ſuch capture continued. The conduct of the *Ruſſian* Government

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on this occaſion is novel and unprecedented, and it ſeems that the caſe which has ariſen out of the conduct of that Government is equally novel. But, exerciſing the beſt judgment I can on the circumſtances that are ſtated in this ſpecial verdict, it is my opinion that the acts of the *Ruſſian* Government towards the ſhips and crews were hoſtile, in conſequence of which the ſhips and cargoes are to be conſidered as under capture and not under an embargo. I concur with the Defendants' counſel in thinking that the term "embargo" implies only a temporary reſtraint of the departure of the ſhip; and I cannot aſſent to the propoſition that the Defendants are bound to prove an abſolute intention at the time to confiſcate and condemn the property at all events, or that in the preſent caſe it will vary the hoſtile nature of the act if it ſhould appear that there was a profeſſed or real deſign to reſtore the property and releaſe the priſoners in an event that might happen, poſſibly after making the ſeizure of the ſhips and the ill-treatment of the crews part of the means of procuring that event. In conſidering the nature of theſe proceedings of the *Ruſſians* I look at the acts themſelves, and not at the language of their orders. Their calling the ſeizure an embargo does not of itſelf make it one; it cannot alter the nature of the act itſelf, though it muſt be confeſſed the language as well as ſubſtance of ſome of thoſe orders is violent enough. To ſee what the legal conſequences of thoſe acts are, it may be proper to look back to the orders, or at leaſt to ſome of them. The firſt order, which is dated *November* 5th, 1800, perhaps may not be conſtrued an act of hoſtility; for by that order, after ſtating the uncertainty whether the agreement reſpecting *Malta*, entered into on the 30th of *December* 1798, would be fulfilled, it is only ordered that an embargo ſhould be laid on all *Engliſh* veſſels in the ports of the empire till the convention ſhould be fulfilled; however, immediately on that order being made guards were placed along the ſhore, not to prevent the ſhips from ſailing, but to prevent the crews from eſcaping, and thoſe guards continued on that duty till the 10th of *November*. It is not neceſſary on the preſent occaſion to ſay that this order of the 5th of *November* amounted to an act of hoſtility, notwithſtanding the intention of it was to prevent the eſcape of the crews: becauſe the order of the 10th of *November* ſpeaks a language perhaps more deciſive. On the 10th of *November* the *Britiſh* ſailors were all taken out by *Ruſſian* guards, and

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marched into the interior of the country, and the foreign ſeamen ſerving on board the *Britiſh* ſhips were put on ſhore and ſet at liberty. Now I cannot well conceive an act more hoſtile than that, or an act more unneceſſary for the mere purpoſe of detention. The crews were totally deprived of their liberty, marched up into the country, and removed from the exerciſe of any duty that belonged to them in their reſpective ſhips. And there ſeemed to be a marked diſtinction between the *Britiſh* ſeamen and the ſeamen who were the ſubjects of other Powers with whom *Ruſſia* had no quarrel. Now if the object was merely to detain the ſhips, what reaſon was there to make that diſtinction? They were all equally bound, by their duty ariſing from their contract with the ſhip-owners, to take care of and to protect the ſhip. But theſe foreigners were claimed by their reſpective conſuls. Why were they claimed by their reſpective conſuls? Becauſe they looked on that impriſonment of the ſubjects of their ſtates as an act of hoſtility, and it was not the intention of the *Ruſſian* Government to commit an act of hoſtility towards them; and therefore they were ſet entirely at liberty. Then came the proclamations of the 18th and 21ſt of *November*; and though the immediate object of the firſt part of thoſe proclamations was not the ſhips now in queſtion, but two other ſhips, yet the ſubſequent part of it ſeems pretty ſtrongly to ſhew the hoſtile views of the Court of *Ruſſia*. It ſtates that two *Engliſh* ſhips at *Narva* had made reſiſtance, fired piſtols, and forced a *Ruſſian* ſailor into the water, and afterwards weighed anchor and ſailed away. This might have juſtified ſtrong meaſures, perhaps, againſt theſe two ſhips. But although theſe two ſhips had dropped anchor and made their eſcape, the revenge of the *Ruſſian* Government was directed againſt the owners of other ſhips that remained in that port, and theſe ſhips are ordered not to be detained, but to be burned. The ſubſequent part of the proclamation ſtates that the embargo is not to be taken off from the *Engliſh* veſſels; it calls it an embargo, but it is manifeſt that the language in the proclamation is merely colourable, probably with a view that their conduct might not appear to other Powers ſo violent as in fact it was; they called it an embargo which was not to be taken off the veſſels, not ſaying one word of the treatment of the crews at the time that proclamation had been iſſued. The treatment of the crews continued after that period exactly the ſame that it was before. I am not aware that any

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material obſervation ariſes on the orders of Council that iſſued in this country in conſequence of the detention of *Britiſh* veſſels in the *Ruſſian* ports; they order *Ruſſian* veſſels to be detained, and they amount ſimply to an embargo. In a ſubſequent order of Council, an endeavour is made to prevent the acceptance and payment of any bills in favour of any perſons reſiding in the Emperor's dominions. Theſe are all the obſervations that ariſe on the language of the orders. The language of ſome of them is, I think, hoſtile enough: but it is what the *Ruſſian* Government has done, and not what it has ſaid, that will denominate the tranſaction by its true deſcription. It is material to conſider what is the difference in fact between that which has uſually been conſidered as an embargo and that ſort of conduct purſued by the *Ruſſians* on this occaſion. It is admitted that a mere embargo, a mere detention, will not prevent the claim of the mariners to a continuance of the payment of their wages, and for the beſt of all poſſible reaſons; in an ordinary embargo, the maſters and mariners remain in poſſeſſion of the ſhip and cargo, and while they are in poſſeſſion of the property they are in a ſituation to diſcharge that duty which the law caſts upon them, namely, to take care of the ſhip and cargo while ſhe is detained in port. The miſchief to the owners would be extreme if ſuch an embargo were to effect a diſſolution of the contract; in moſt caſes, the property would be loſt if there were not proper agents to take care of it, and the mariners would loſe all their wages. But what duty remained to be done by theſe *Britiſh* ſeamen when the ſhips had been taken from them, when the cargoes had been taken away, and when they themſelves had been ſent into the interior of the country at a great diſtance from the place where their duty was to be exerciſed? Surely the caſe is extremely different; there was no duty to be performed, no relation of maſter and ſervant ſubſiſting; both he who was the maſter, and they who were the ſervants, were become the ſervants and the ſlaves, for ought I know, of others, for perhaps they were in a ſtate of ſervitude and captivity; and what was to be the end of their detention they did not know. As they had no care attached to their ſituation, and no duty, there was no foundation for the earning of wages during that period. It is ſaid it was their duty to ſtay and to wait the event, and to take care of the property for the benefit of their employers. I ſhould wiſh to hear ſome authority for that propoſition.

tion. I agree it is their duty to ſtay while a common embargo only is laid on the property. But in this caſe what reaſon was there to make it incumbent on them to ſtay? Suppoſe a mariner in cloſe confinement ſhould have found the means of eſcaping, and ſhould have come to *England*, would he have acted in contravention of his articles by ſo conducting himſelf? or could it be contended that, if the ſhip was afterwards ſet at liberty and performed the contract with the freighters ſo that ſhe earned freight, the mariner who made his eſcape under ſuch circumſtances would not be entitled to wages *pro ratâ itineris*? It ſeems to me in reaſon and in juſtice that it cannot be ſo intended: for the ſailors never meant to enter into a contract to ſtay in priſon if the ſhip ſhould be laid under an hoſtile capture. With reſpect to the caſes cited, the novelty of this caſe prevents, I think, any great uſe being made of them; hardly any one of them applies: and as to the foreign juriſts, they are too looſe and too vague to be made uſe of either on the one ſide or on the other. For the Plaintiff, the two caſes moſt ſtrongly relied upon in argument were thoſe of *Chandler* v. *Greaves*, and *Paradine* v. *Jane*; neither of which caſes, in my mind, apply at all to the caſe before the Court in favour of the Plaintiff. The firſt of theſe caſes, which is to be found in 2 *H. Bl.* 606. note *a*, was an action for wages, brought by a mariner who in the courſe of his duty had received a blow from a piece of timber falling on him, in conſequence of which, when the ſhip arrived at *Philadelphia*, the maſter put him on ſhore and paid him wages up to that time. In every contract of ſervice, the contract goes on though the ſervant be diſabled by ſickneſs. A ſervant is never conceived to enter into an engagement that he will continue in health; it is no part of the contract that he will continue ſo, indeed ſo far from it that the maſter is in general obliged to maintain his ſervant in ſickneſs as well as in health. In *Chandler* v. *Greaves*, the conduct of the maſter of the ſhip was totally unjuſtifiable; he ought to have kept the ſeaman and brought him back to the place where he firſt took him on board; he ought to have brought him home. The Court held, that the mariner was entitled to wages during the whole voyage, the ſhip having earned her freight. With reſpect to the caſe of *Paradine* v. *Jane*, which is reported in *All.* 27., that caſe does not apply at all; it was under circumſtances extremely different from that now before the Court,

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Court, and the principle is not the ſame. That was an action brought on an expreſs covenant made by a tenant to repair, and the Court took a rational diſtinction, that where an obligation is impoſed by rule of law, and there is no expreſs covenant, the law introduces a reaſonable exception, *viz.* that an act of irreſiſtible violence will excuſe the party. But if a party enter into an abſolute contract, without any qualification or exception, and receives from the party with whom he contracts the conſideration for ſuch engagement, he muſt abide by the contract, and either do the act or pay damages, his liability ariſing from his own direct and poſitive undertaking. But how does that apply to a caſe like the preſent? Here is no poſitive independent covenant. Mutual obligations are introduced by the articles, and the performance by one of the parties is the condition on which performance is to be required of the other. In the articles themſelves, and in the declaration, the ſervice on board is the conſideration upon which the payments are to be made. I do not mean to inſinuate that a man cannot be earning wages notwithſtanding theſe words in the declaration, though he happen to be out of the ſhip; for if it be by the licence of the officers it is the ſame thing as if he were on board. This contract, this duty, only require that he ſhould be in the ſervice of the ſhip; and he may render as eſſential ſervice to the ſhip on ſhore, at certain periods, as if he were on board; but ſtill the ſervice he is to perform is the ground on which the owners contract to pay him wages, and therefore it ſeems to me that theſe caſes do not apply to the caſe before the Court. For the Defendant two caſes have been cited, *viz.* the caſe of *Curling* v. *Long*, and of *Chandler* v. *Meade*; perhaps neither of theſe caſes can be conſidered as a very ſtrong authority; the laſt is only a *Niſi Prius* deciſion; and the expreſſion of Lord Chief Juſtice *Eyre*, in the caſe of *Curling* v. *Long*, which was decided in this court, was certainly an *obiter dictum*; for it was not neceſſary to the deciſion of that caſe to ſay that the capture of a veſſel, though afterwards recaptured, puts an end to the contract for wages, and that although the mariners were entitled to ſomething, yet it was on a new contract, and not on the original contract. In the caſe of *Higgins* v. *Ingleton*, *Ld. Raym.* 1211. Lord *Holt* ruled that an impreſſed ſeaman ſhould have his proportion of wages for the time he ſerved in the ſhip: now why had he a proportion only? becauſe there was an end of his ſervice; it was not his own fault that he was preſſed; it was an

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act of the ſtate. The ſhip earned her whole freight; the owners loſt nothing of her freight; and yet it ſeems to be Lord *Holt*'s opinion on that occaſion that he was only entitled to wages during the time he was on board. The other caſe cited was *Chandler* v. *Meade*: there the Plaintiff was hired at monthly wages, and ſerved two months on board the ſhip, which was afterwards captured, and ranſomed; the Plaintiff was impreſſed off *Plymouth*, and the ſhip arrived and delivered her cargo. Lord *Holt* held that no wages were due, the ſhip being taken and ranſomed. The counſel on the other ſide alleged that there was a cuſtom of merchants which entitled the ſeamen to recover *pro ratâ itineris*, but he failed in the proof of that cuſtom, and therefore the Plaintiff was nonſuited: that caſe is deciſive as to Lord *Holt*'s opinion upon the effect of the capture. He ſeems to think it a complete diſſolution of the contract, and it has not been contended by the Plaintiffs that capture is not a diſſolution of the contract. I have declared my opinion on the reaſon of the thing. As no ſervice is capable of being performed, the mariners are entitled to no wages; but the hardſhip of the caſe is preſſed very much on the Court. Now I do not feel any circumſtance of hardſhip; if the ſhips had not been reſtored the hardſhip would have been much greater on the ſeamen; they would then have been impriſoned, and would have had no wages at all, whereas the veſſels having been reſtored, and having earned freight, they are entitled to wages for that time they ſerved, and that they have been paid. We muſt conſider the grounds and reaſons of the general rules of the marine law, which impoſes this hardſhip not only on the crew but on the owners: for, from the nature of that ſort of adventure, both thoſe parties are certainly ſubject to great hardſhips and great riſks. I think both the owners and the mariners in every contract of this kind are to be conſidered as adventurers, and both are bound to abide by the conſequences of what may happen in the courſe of the voyage. This is the nature of the contract they enter into, each of them underſtands his ſituation, and every mariner knows under what circumſtances he is liable to the forfeiture of wages. But I do not know whether this is for the diſadvantage of the mariners. The great object of the law is to encourage commerce, and it is not for the advantage of mariners to throw all the riſk and extenſive conſequences (which would be the caſe if we were to determine in favour of the Plaintiff) on the principal adventurers; in this caſe they are ſuffering as

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well as the mariners, there being a detention of the veſſel for ſix months, during which time ſhe has been uſeleſs to the owners, who might have uſed her for other beneficial purpoſes. They have been loſing the intereſt of the money on the capital they have employed in the adventure, and they have loſt the profits and benefits they would have received but for this reſtraint. That is the hardſhip on their part. On the other hand, the mariners have loſt nothing except their time for ſix or ſeven months, and they have endured their impriſonment; which is a circumſtance of hardſhip incident to their ſituation. But if it were to be contended that in all ſuch caſes as this the owners ſhould be obliged to maintain them, and to pay them wages for any length of time in the caſe of a hoſtile capture againſt the ſubjects and property of this country, I do not know where the miſchief would end, and it would be a very great diſcouragement to mercantile adventure. But without reflecting on the hardſhips of this caſe, putting it on the ground of capture, I think the owners are not liable to wages, and I think the ſeamen muſt be underſtood to have contracted to endure the hardſhips of ſuch capture. I am of opinion, therefore, that there ought to be judgment for the Defendant.

ROOKE J. Since I have heard the argument in the caſe of *Leatham* v. *Terry* (*a*), I am more aware than I was before of the extent of the queſtion now before the Court, *viz.* What conſtruction our courts of law ſhall put upon the late detention of our ſhips by the *Ruſſian* Government? I wiſhed to have taken more time to conſider the point: but it has been thought expedient that this Court ſhould deliver a judgment during the preſent term, that the parties may not be delayed as to their writ of error. I freely own my mind is not at preſent ſo ſettled as to enable me to give a decided opinion: but I will ſhortly ſtate the inclination of my judgment, and the grounds on which it is formed. I incline to think it ſhould be conſidered as an embargo only; and that if it is not in the ſtricteſt ſenſe an embargo, yet ſtill it bears a nearer analogy to an embargo than to a capture. My reaſons are theſe: firſt, The Emperor of *Ruſſia* calls it an embargo; he commands that an embargo be laid; he reſolves not to take off the embargo till the agreement reſpect-

(*a*) A queſtion ariſing out of the *Ruſſian* embargo between underwriters upon ſhip and underwriters upon freight, the former claiming the freight earned by the ſhip after her releaſe by the *Ruſſian* Government as an incident to the ſhip which had been abandoned to them during the embargo. No judgment was at this time pronounced by the Court.

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ing *Malta* is carried into execution, and in the ſubſequent proclamation he engages to make ſatisfaction to the *Britiſh* ſubjects who have ſuffered loſſes during the troubles which have interrupted (*altéré*) the good underſtanding between his empire and *Great Britain*, and that the effects (*mis en ſequeſtre*) put under ſequeſtration ſhall be reſtored. Now a ſequeſtration does not import a change of property; but, on the contrary, that the property continues to be the right of the true owner, and is held as a truſt by the ſequeſtrator. Our own proclamation ſtates that our veſſels are detained in the ports of *Ruſſia*, and lays an embargo on the *Ruſſian* ſhips and effects, but directs that no violence be offered to the crews, nor any injury done to the effects. The language therefore of the *Ruſſian* Court is embargo, the retaliation of our Court is called an embargo: both are detentions *quouſque*; but in the one caſe the crews and the effects are treated with more rigour and violence than in the other. I cannot perſuade myſelf that this difference of treatment will change the nature of the act itſelf, and turn that into an hoſtile capture which the *Ruſſian* Government declares to be a temporary detention: nor do I think now, when the property is reſtored and ſatisfaction made, that I have a right in my judicial capacity to call this act of the *Ruſſian* Government by any other name, or to conſider it in any other light than that in which it ſeems to have been conſidered both by the *Ruſſian* Government and our own. The principal grounds of argument on the other ſide have been, 1. that the crews were taken out of the ſhips, and treated as priſoners; 2. that while priſoners the relation of maſter and mariner ceaſed between the ſailors and their captains; 3. that if they were entitled to wages, there is no ſaying to what extent of time the owners might be liable to pay them. Firſt, I do not think that the treatment of the crew as priſoners, and marching them up the country, varies the nature of the detention: it is ſtill an embargo, or detention *quouſque*. Suppoſe, inſtead of taking all the ſailors out, they had taken half out and confined them; would thoſe men, ſo confined, have been entitled to their wages? I think they would: yet during their confinement they could have rendered no actual ſervice to the owner. Secondly, as to the relation ceaſing. It may be ſuſpended as to all the purpoſes of actual ſervice; but ſo it is in the caſe of common embargo. If twenty men are neceſſary to navigate the ſhip, two or three may be ſufficient to take care of her in port, and the reſt are as uſeleſs to the maſter and owners as if they were in priſon. The maſter indeed may

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have a controul over them; but this is in many cases productive only of trouble to him; he would have less trouble with them if they were to be taken from him and confined, and restored to him when the embargo was taken off. Thirdly, As to the length of time during which the owners may continue liable to wages being uncertain, it is not more uncertain than in the case of a common embargo. They are liable till it is taken off; it will not be taken off sooner or later because of the imprisonment of the crew. The owners are not more injured by taking the crew out than if they had been suffered to remain on board: perhaps less so; because the ship's provisions are thereby saved. These are the reasons which incline me to think that this seizure ought not to be considered in a court of law as differing in its legal consequences from a common embargo. And I am the less disposed to differ it, because I am not prepared to say that there is any middle state between an embargo and a capture; and if this is not embargo, but is to be considered as capture, it may follow that all contracts respecting the ship are at an end, that the charter-parties are annulled, the freight lost, and of course the wages lost also, and though in some of the cases the freight has been actually received, and therefore some wages may be claimed, yet when that is not the case, if we put such a construction upon the acts of the *Russian* Government as the Defendant insists upon, those poor sailors, who have navigated the ships out and home, will be indebted to the generosity of the owners alone for their wages out, and be entitled only on a *quantum meruit* for a remuneration of their services in bringing the ship home. If this be in legal effect not different from a common embargo, then, as I understand, it necessarily follows that all the contracts continue, unless dissolved by consent of the parties. And in the present case, there having been no actual dissolution, the contract continued during the time of the detention, and the sailor is entitled to his wages. It has been argued, that by separating the crew from the master, he could not discharge them; I say he could not discharge them in the case of a common embargo without their consent, unless in case of misbehaviour. And as in the case of a common embargo it is not probable that he would consent to discharge his crew, though they might desire it, if he expected his vessel to be soon released, so in the case of such an embargo as this in question it is not probable that the sailors would consent to be discharged, if they were to remain in prison, and would be thereby disabled from earning wages elsewhere. These are the reasons

which incline my mind to think the Plaintiff is entitled to recover: and they apply to the cases both of foreign and *British* seamen. But as I am not so satisfied with them as to have entirely settled my opinion, I shall so far defer to the authority of my two Brethren as not to divide the Court, and thereby stop any judgment; but shall consent that judgment be given for the Defendant.

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HEATH J. These are two actions brought, the one by a *British* subject, the other by a foreigner, and their declarations severally state that, in consideration that they served on board their respective ships, the Defendant severally agreed to pay them their stipulated wages by the month. There is an averment that the Plaintiffs served aboard their respective ships. The hiring of mariners for a voyage is an executory contract, the service must be performed before the wages become due. There are many things that will dispense with the actual service, such as sickness and any accidental infirmity that happens after the mariner has entered on his services; but then the mariner is usually in the ship, and the ship is earning freight, so that there is a fund out of which the wages may be paid. It has been decided that an embargo of a temporary nature does not interrupt the contract. The matter that comes to be discussed is, Whether this be an embargo or an act of hostility? For if this be an act of hostility it discharges the party to a marine contract from performance. An embargo is merely temporary, and has no feature of hostility, inasmuch as it may be, and in experience often is, laid on ships belonging to the subjects of the power which imposes it: and sometimes it is imposed by friendly powers to prevent intelligence from being given to their enemies with whom they are at war, or for other urgent occasions to be justified only on a principle of necessity and self-preservation. In all these cases the mariner is serving aboard his ship, and in the actual employ of the master. The latter has a controul over his crew, and in some sort over his cargo. For he may land his cargo and dismiss his mariners. Here was a complete interruption of the service, and consequently of the contract. The master and crew were separated from their respective vessels and cargoes. It is found that the crew were made prisoners. The notice of the Emperor of *Russia* declares that the embargo shall not be taken off until the agreement of the convention concluded in 1798 shall have been completely carried into execution. This is a general reprisal, and falls within the definition given by

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Vattel, b. 2. *c.* 18. *f.* 342, 3. For he ſays, If there be any matter in diſpute between two nations, and one call upon the other to come to a fair diſcuſſion of the matter, and the ſtate ſo called upon refuſe, the other ſtate may iſſue general repriſals. Every general repriſal is an hoſtile aggreſſion. The *Engliſh* veſſels detained at *Narva* were burnt. This was an act beyond repriſals, for the making of repriſals is merely to coerce the party againſt whom it is taken to do juſtice. Every taking by virtue of a general repriſal is a ſequeſtration and detention *quouſque*. We are at preſent in the ſame ſituation with regard to *France*. Our preſent repriſals againſt that country, though founded, I hope, in better reaſon and more conſonant to juſtice, proceed upon the ſame principle. It has been urged on behalf of the Plaintiff that the ſeizure of the ſhips will not make a war, unleſs other hoſtilities follow, and the event muſt decide the queſtion.' To this it may be anſwered, that hoſtilities accompanied and followed the ſeizure. The battle of *Copenhagen* and the forcing of the *Sound* were hoſtilities; and it is found in the ſpecial verdict that the *Danes* were the allies of *Ruſſia*. Suppoſe open war had followed between *Great Britain* and *Ruſſia*, and then the Emperor *Paul* had died, and the ſhips had been reſtored within the ſame compaſs of time as at preſent; according to the argument the Plaintiffs could not have recovered. I cannot ſee how the difference ariſes. All hoſtilities between the two nations ſubſequent to the firſt ſeizure would have been extrinſic to the contract and the performance of it. From hence it appears that no ſervice was either actually or virtually performed by the crews of theſe veſſels during their impriſonment. There is a point of view which in my apprehenſion will ſet this matter in a clear light: The contract between owner and mariner being reciprocal, an action will lie for the owner againſt the mariner for not performing his part of the contract and ſerving him aboard his ſhip. Suppoſe that in the preſent inſtance the Defendant had ſued the Plaintiff, and had alleged a breach of the contract in abſenting himſelf from the ſhip during his confinement. It muſt be admitted that his involuntary abſence, occaſioned by the violence of the *Ruſſian* Government, would afford a clear defence to the mariner, and would be a diſpenſation for the non-performance of his contract. The owner then has as good a defence againſt the claim of the the mariner for not ſerving him, as the mariner has againſt the

owner

owner for wages. In either case the law absolves the owner and mariner from the full performance of the contract, which is suspended by an hostile aggression, the duration of which in point of time is indefinite and uncertain. Considering this restraint as an interruption of the contract, the rule which must govern this case is clear and intelligible; the wages must be regulated by the actual service. Great would be the inconvenience if the contract should be holden to have continuance. It might endure for such a length of time as to prove ruinous to the owner of the ship. If the freight of the ship were to be paid by the month the like construction of the contract must take place in regard to the freighters, and must be equally ruinous to them. Such a decision would be contrary to the grand principle of the marine law, which protects the owners by making the right of the mariner to his wages commensurate to the right of the owner to his freight: for so I understand the maxim that freight is the mother of wages. In the present case the freight is payable by the ton, and the wages by the month. Supposing that the freight had been made payable by the month, the same question would arise concerning freight as is now made concerning wages. We have been much pressed with the case of *Hadley* v. *Clark*, 8 *T. R.* 259. That was the case of an embargo laid by the Government of this country. Liberty was given by the King's proclamation, dated in the next month after the embargo, to reland the goods, and neither the freighters nor the owners of the ships, for two years and upwards, chose to avail themselves of this licence. The maxim cited out of *Aleyn* by Mr. Justice *Lawrence* does not apply to marine contracts, the performance of which is excused by the act of the King's enemies. Arguments have been drawn from cases where mariners have been disabled by sickness or accident from performing their contract. In all those cases the freight has been earned which furnished a fund for the payment of wages. In *Chandler* v. *Grieves*, the seaman only recovered his wages to *Philadelphia pro ratâ itineris*. In the case of the mariner's dying in the course of the voyage, it should seem that he is entitled to a proportionate part of his wages, unless he be excluded by the specific terms of his contract. So in the event of a capture and recapture, as in the case of *Luke* v. *Lyde*, as was the freight so must the wages have been apportioned. I perceive no difficulty in considering this contract as suspended by an act of hostility. It is analagous to the

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case of a capture and recapture. It is immaterial whether the contract be interrupted in the middle or determined towards the end of the voyage. It is consonant to every principle of equity and commutative justice that the act of the King's enemies, inasmuch as it is a common calamity, should fall equally on the freighter and the owner of the vessel in regard to the contract between them, and on the owner of the vessel and the mariner as between them. If the owner of the vessel were to receive his whole freight, when the vessel is hired by the month, or the mariner his whole wages, they would be exempt from bearing their respective shares of an inevitable calamity which is common to all. In all other common calamities, as in the case of wreck or recapture, the owner receives freight *pro ratâ itineris* in the one case, or in the latter event contributes to the salvage; the wages, as the freight, must abate proportionably; and on principle I cannot see how these different calamities are distinguishable from each other. We need not be under any alarm lest the owners of the goods in this case should refuse to pay the freight. For the cargo is valuable, and if they refuse to pay the freight they must abandon the cargo. The effect of the hostility is merely to dissolve the contract, if it cannot be executed, or to suspend it, if by subsequent events it can be carried into execution to the good liking of both parties. For these reasons I am of opinion that the Plaintiffs ought not to recover their wages for the time that they were prisoners, and did not serve aboard their respective ships.

Lord ALVANLEY Ch. J. This is an action for mariners' wages brought against the owner on a contract entered into between him and the mariners, by which they hired themselves for a voyage at monthly wages, to be paid according to the laws of *Great Britain*, and in consequence of such a general hiring for the voyage covenanted that they would do their duty and obey the lawful commands of the officers on board the said ship. I cannot think that the words "on board" used in the declaration can operate to prevent them from recovering, as they might have done if the declaration had been more generally framed. They might have alleged that they did the duty as mariners during the said voyage. For that purpose they were hired; and therefore, in point of law, it will not make any difference though the parties were not actually on board all the time. I cannot but recollect that there was another con-

tract entered into at the ſame time between the owners and merchants. Unfortunately in the preſent caſe the owners thought fit to enter into a different agreement with reſpect to freight, and the rate by which that was to be aſcertained. We have therefore only an allegation in the ſpecial verdict that the ſhip was ſtipulated on a voyage from *London* to *Peterſburgh* and back again, and that the freight was to be paid, not by the month, but by the ton, provided the ſhip performed and conſummated that voyage. If, inſtead of the parol agreement entered into between the merchant and the owner in this caſe, a charter-party had been executed, I believe there would have been found in that charter-party a particular proviſo with a view to the very caſe that has happened, namely, the reſtraint and detainment of princes. In general there is a particular ſtipulation provided for that event; which ſhews it is an event which may be in contemplation, and frequently is in contemplation of the parties. The contract between the owners and the ſailors is a general one; and with reſpect to this particular riſk, all veſſels are known to be expoſed to it that ſail on foreign voyages. It is a general contract that they will ſerve during that voyage; and therefore, as it appears to me, the only queſtion on this occaſion is, Did the voyage ſubſiſt, or did it not? If the voyage was in ſubſiſtence, I am of opinion that the Plaintiffs continued to earn wages as ſailors during the whole time. Whatever their ſituation might be, whether they were under the preſſure of a ſuperior force acting upon them contrary to the law of nations or not could make no difference. If the voyage ſubſiſted they are entitled to receive wages, unleſs they have by their miſconduct forfeited that right, or unleſs they have entered into ſtipulations to the contrary. As it is obſerved in *Hadley* v. *Clarke*, the contract muſt ſpeak for itſelf, and where there is an expreſs and poſitive engagement to do any thing, and circumſtance not within the power of either of the parties occurs, that circumſtance cannot be alleged as an excuſe for not fulfilling the contract. The contract here being that the Plaintiff ſhall ſerve on board during a voyage from *London* to *Peterſburgh* and back, it is one voyage. The law of *England* has (not I believe by poſitive ſtatutes, but by conſtant uſage) impoſed this burden on the ſailors, that if the ſhip ſhall by any accident be prevented from finiſhing her voyage they ſhall loſe all their wages, unleſs they have made ſome ſtipulation to the contrary, or con-

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tracted to ſerve in diſtinct voyages, or unleſs the owners have received ſome benefit in the nature of freight upon a diſtinct voyage. Now ſurely this entitles the ſailors to a very liberal conſtruction of this contract with reſpect to themſelves: for if the owner be not able to perform his contract with the merchant, whereby he loſes his reward, they muſt likewiſe loſe every benefit which might reſult to them. I cannot admit that the nature of the contract between the merchant and the owners can have any effect on the contract between the ſailors and the owners, nor are the ſailors, when they demand their wages, to be told that in conſequence of the peculiar nature of the contract for freight the owners gain no greater freight than if the detention had not taken place. I agree with my Brother *Heath*, that the caſe muſt be conſidered in the ſame light as if the freight, inſtead of being at ſo much *per* ton had been at ſo much *per* month; and then I admit, that in caſe of capture or otherwiſe the ſame arguments would in a great meaſure have ariſen as between the owner and the merchant, as between the owner and the mariners. I have very little doubt, though my Brothers ſeem to doubt, upon this point, that the owners would have been entitled to freight at ſo much *per* month during the whole time, unleſs the merchant had ſtipulated to the contrary. Let us now inquire what effect theſe acts of the *Ruſſian* Government had, whether they put an end to the voyage or divided it into two parts? On theſe articles the contract muſt be conſidered as entire; and as long as that contract ſubſiſts there can be no ſuch thing as an interruption; it is either entirely at an end or entirely ſubſiſts. I admit that capture puts an end to the contract: but I do not admit, nor do the caſes eſtabliſh that capture one day and recapture the next will put an end to the contract; and, with great deference to that *dictum* of Lord Chief Juſtice *Eyre* in the caſe of *Curling* v. *Long*, I think that capture and recapture do not put an end to the voyage. Capture followed by a total loſs does; but capture followed by recapture does not, and God forbid it ſhould; for when a ſhip is taken *infra præſidia hoſtis* and becomes the prize of the enemy, if capture puts an end to the voyage the ſailors are not intereſted to retake the veſſel, for although the crew ſhould riſe on the enemy and recapture and bring back the ſhip, they are to be told ſhe has been captured, which puts an end to their contract for wages. It has indeed been contended that the mariners in this caſe were guilty of

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a breach of duty in ſubmitting to a ſuperior force, and thereby loſt their wages. By the law if the owner has loſt his ſhip, the mariners will loſe their wages: but this is not on the ground that the mariners have ſubmitted to a ſuperior force, but becauſe the owner, having loſt his ſhip, the freight and all the fruits of the voyage are loſt, and therefore the ſailors ſhall not be entitled to wages. Suppoſe the ſhip is out of the cuſtody of the maſter and crew for one day, and is recaptured the next, and the owner receives all the fruits of the voyage in the ſame manner as if ſhe had not been taken, is the contract for ſailors' wages to be at an end? I cannot ſubſcribe to the doctrine that any tranſitory act of poſitive hoſtility is to ſuperſede the contract. I apprehend that the contrary has been frequently determined. I believe that embargoes have often been laid on in foreign ports, not merely on veſſels by way of caution, as was done in the caſe of *Hadley* v. *Clarke*, but by way of ſecurity againſt a ſuppoſed aggreſſion; and am I to be told that ſuch acts put an end to the contracts for wages, though the embargo be taken off the next moment? Suppoſe the *Ruſſians*, hearing that we had committed an act of aggreſſion againſt them, reſolved to detain our ſhips in their ports, and that the fact of our having done ſo ſhould turn out to be unfounded, and in a week's time news ſhould arrive that the veſſels were reſtored. It is not contended that if the crew had remained on board the detention could have amounted to a capture. There is an end, therefore, of the argument founded on the *quo animo*. The embargo cannot amount to a capture unleſs it be accompanied by acts different from thoſe which attend a common embargo. If then an embargo, though not laid on merely for the ſake of ſecurity, but by way of retaliation, when not accompanied with circumſtances of extraordinary rigour, or carried beyond the uſage of the law, would not put an end to the contract, we are to conſider whether the circumſtances which occurred in this caſe, of the maſter and mariners being taken out of the ſhip, of the ſhip itſelf being taken into the poſſeſſion of the *Ruſſians*, and the crews ſent up into the country and treated with rigour, will make any difference. I wiſh the law of *England* had provided for thoſe caſes in which parties may abandon, and had declared when it ſhould be competent to the owner or ſailors to pronounce the contract at an end. But unfortunately the ſame rules have not been adopted in this country which prevail in ſome foreign countries with reſpect to right of abandonment,

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ment, if the embargo laſts beyond a certain time. I hope, however, that ſuch will in future be provided againſt by the charter-parties and articles which the merchants of *Great Britain* ſubſcribe. Suppoſe this embargo not to have been laid on profeſſedly with a view to appropriate the captured veſſels to the *Ruſſian* Government, but by way of detention until ſatisfaction ſhould be obtained from the *Britiſh* Court, and that it had been followed up with ſuch a degree of rigour and for ſuch a length of time that it would have been impoſſible to ſay that the ſailors were bound to continue with the ſhip; ſtill, I ſay, that in the preſent caſe the parties have agreed that the embargo ſhould not have the effect of diſſolving the contract. For it is to be remembered that the mariners were not permitted to remain on board earning their wages, but were removed up the country. Did they then come back on any freſh contract? Was there any intimation to them that there was an end of the voyage? No ſuch thing appears. Now I ſay if either of theſe parties had a right to put an end to the contract, yet neither of them exerciſed that right. The captain conſidered the mariners as his crew, and they him as their maſter, and offered to do any thing they could for the benefit of the owners in that diſtant part of the world, by completing the voyage and bringing the ſhip home. Had they refuſed ſo to do, the owners would perhaps have procured another crew. Abandonment does neceſſarily put an end to the contract between the owner and the ſailors. The inſured, indeed, had a right to ſay to the underwriter that there was a total loſs, for the aſſured are ſecured by the policy as well againſt detention of princes as againſt capture. The right to abandon, therefore, does not neceſſarily include a total loſs. Had the *Ruſſian* Government made the ſhip prize the mariners would have loſt their wages; and on the other hand, if the voyage ſubſiſted, ſubject only to a temporary detention of the ſhip, the ſailors are entitled to their wages. The caſes of *Hadley* v. *Clarke*, and *Blight* v. *Page*, which I think almoſt decide this caſe, eſtabliſh that where a ſhip-owner contracts that his ſhip ſhall go to a certain place and bring back a certain cargo for ſo much *per* ton, and the merchant contracts to furniſh him with that cargo, although by the act of an hoſtile ſtate the merchant is prevented from furniſhing the cargo, the owner is nevertheleſs entitled to his whole freight. Now how does that differ in principle from the preſent caſe? Suppoſe a fleet of ſhips, inſtead of being ſtopped by the act of the *Ruſſian* Govern-

ment, had been ſtopped by the act of God. Suppoſe, in conſequence of ſtormy and tempeſtuous weather, they are obliged to winter in foreign parts, and the crews are under the neceſſity of abandoning their veſſel in cold climates, if there be no ſtipulation to the contrary the owner will have his freight notwithſtanding. Unleſs, therefore, the nature of the act of the *Ruſſian* Government completely alters its effect in point of law, there being no difference with regard to inconvenience, the caſe muſt be governed by the principle laid down in *Paradine* v. *Jane*. The parties know what they are about; they contract, the one for the voyage and the other to carry the cargo at ſo much *per* ton. The ſailors have gone the voyage to *Peterſburgh* and they have come back. In their contract they ſaid, we will be paid ſo much *per* month. It appears to me, therefore, in the firſt place, that an embargo does not neceſſarily put an end to the contract, though I do not ſay that there may not be caſes where it may amount to a total loſs. But I cannot think that it is abſolutely neceſſary to conſider this detention as a capture. It was a detention which might poſſibly be intended to be a capture in a certain event, and if that event had taken place it would have been a capture. In conſidering this caſe I lay great ſtreſs on the conduct of the parties. Poſſibly the Defendant was abſolved from his contract with the ſailors, and if he had thought fit, by the language of the articles, he might have hired other ſailors. But he has not done ſo. Both the captain and the ſailors have elected by their conduct to conſider themſelves as acting under that contract. However the Emperor of *Ruſſia* might think proper to ſeparate the crew from the ſhip and take the command from their maſter, the ſailors boldly and faithfully did their duty to their commander, and did not avail themſelves of the opportunity of deſerting the ſhip, which if they had done I will not ſay what the conſequences might have been, for a ſeaman is not bound to ſubmit to all ſorts of hardſhips. In this caſe every man on board did his duty, in conſequence of which the ſhip was brought ſafe to the port of delivery and earned her freight. In *Blight* v. *Page* it was ſtrongly urged that as the ſhip was abſolutely prevented from going into a foreign port, where ſhe was to be furniſhed with a cargo, both parties ought to bear the loſs equally. But the Court ſaid that as the merchant had ſtipulated to furniſh a cargo he was bound to perform his contract. Embargo is a common incident in all voyages when *Great Britain* is at war with

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other countries. However this incident may be conſidered in the charter-party it certainly has been kept out of ſight in the contract with the mariners. Now why did not the ſhip-owner ſtipulate with the mariners that in caſe of detention they ſhould not continue to earn their wages. It was perfectly competent to them ſo to do, and I truſt that in future they will do ſo: for on the true principle of *Hadley* v. *Clarke* and *Blight* v. *Page*, with which caſes I am not diſpoſed to quarrel, if the party do not provide againſt that which is a common riſk, but makes a general contract, he muſt ſuffer for his neglect. The only queſtions in this caſe are, Did this voyage ſubſiſt? and has the ſailor a right to recover his monthly wages for all the time which he ſerved during that voyage? I am of opinion that he has not forfeited his wages by any act of his own; that the voyage ſubſiſted, that during the continuance of the voyage his wages were going on, and that he has a right to recover them.

Judgment for the Defendant.

May 23*d*.

The Maſter, Wardens, and Commonalty of the BUTCHERS' COMPANY v. BULLOCK.

A penalty of 20*s*. having been impoſed by one of the by-laws of the Butchers' Company on all perſons ſelling meat on a *Sunday* within their juriſdiction, it was declared by a ſubſequent clauſe that if any offender ſhould deny, refuſe, or neglect to pay the penalty he ſhould be liable to an action of debt.
Held that it was not neceſſary to prove a previous demand in order to maintain ſuch action, although averred in the declaration.

DEBT on a by-law. The declaration recited a charter incorporating the ſociety of the art or myſtery of butchers within the city of *London*, the liberties and ſuburbs thereof, and within any other place or places whatſoever within the ſpace of two miles from the ſaid city of *London* by the name of 'The Maſter, Wardens, and Commonalty of the Art or Myſtery of Butchers of the City of *London*,' and that power was granted to them from time to time to make ſuch reaſonable ordinances, &*c*. as to them or the major part of them, of whom the ſaid maſter and two wardens to be three, ſhould ſeem good, alſo to impoſe ſuch penalties and puniſhment by impriſonment or fine as ſhould be ſufficient to maintain ſuch ordinances, &*c*. It then ſtated a by-law made as follows: That whereas the *Lord's-day*, commonly called *Sunday*, was by Chriſtians to be kept holy, it was therefore ordained that no perſon then uſing or exerciſing or who thereafter ſhould uſe or exerciſe the art or myſtery of a butcher, and did or ſhould inhabit or dwell within the ſaid city of *London*, the liberties or ſuburbs thereof, or within two miles of the ſame city, ſhould keep open any ſhop or

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offer or put to ſale or ſell any fleſh upon the ſaid day, and that any perſon who ſhould offend contrary to any part of that ordinance ſhould forfeit and pay to the ſaid maſter, wardens, and commonalty, for the firſt time 20*s.*, for the ſecond time 40*s.*, and for every time after 3*l.*; and that the ſums of money forfeited ſhould be to the uſe of the maſter, wardens, and commonalty, and the action ſhould be brought in their name; and alſo that if any member of the ſaid company within the city of *London*, the liberties or ſuburbs thereof, or within any other place within the ſaid ſpace of two miles from the ſaid city of *London*, did or ſhould thereafter infringe, break, or not duly obſerve any act, order, or ordinance in thoſe orders or ordinances expreſſed or contained, and ſhould thereby incur any penalty, fine, or forfeiture in the ſaid order or ordinances contained, and ſhould or would *deny, refuſe, or neglect* to pay ſuch ſum or ſums of money as ſhould happen at any time thereafter by him or them to be forfeited or due to the ſaid maſter, wardens, and commonalty for any pain, penalty, or forfeiture or breach of any of the ſaid acts, orders, or ordinances, it ſhould be lawful for the ſaid maſter and wardens to recover ſuch penalties, *&c.* by action of debt in any of his Majeſty's courts of record at *Weſtminſter*. It then ſtated a confirmation of the by-laws and notice to the Defendant; and proceeded to allege a breach of the by-law by the Defendant in expoſing to ſale meat on a *Sunday*, "whereby the Defendant forfeited to the Plaintiffs for his ſaid offence the ſum of 20*s.*, and which ſaid ſum of 20*s.* he the ſaid Defendant afterwards, to wit, on, *&c.* was duly requeſted by the ſaid Plaintiffs to pay to them, to wit, at, *&c.* but the Defendant then and there wholly refuſed and neglected to pay the ſame. By reaſon whereof an action accrued," *&c.* The cauſe was tried before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after laſt *Hilary* term, when a verdict was found for the Plaintiffs, with liberty to the Defendant to move that a nonſuit might be entered.

Accordingly *Bayley* Serjt. on a former day obtained a rule *niſi* for entering a nonſuit or ſetting aſide the verdict and granting a new trial. He moved on two grounds; firſt, that the by-law upon the face of it was bad, ſince it profeſſed to regulate the trade of Butchers out of the limits to which the charter extended; for the words of the by-law were, "that no perſon exerciſing the trade and inhabiting within the ſaid city, *&c.* ſhould keep open ſhop on a *Sunday*," without adding within the ſaid city, to which limits he contended

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tended the by-law ought to have been confined in its terms. Secondly, That at the trial the Plaintiffs had failed in proving a demand of the ſum forfeited, which by the terms of the by-law was made neceſſary, and was alleged in the declaration.

Shepherd and *Beſt* Serjts. ſhewed cauſe, but were ſtopped by the Court from arguing the firſt point, which they ſaid might be brought on by motion in arreſt of judgment. With reſpect to the ſecond objection, they inſiſted that the demand alleged in the declaration did not amount to a ſpecial demand, but was nothing more than a *licet ſæpius requiſitus*, and therefore need not be proved, unleſs made neceſſary by the terms of the by-law; that the by-law created a duty in the party to pay immediately he committed the offence, and that as the offence was committed by his own act, and he could not be ignorant of the penalty which he thereby incurred, it was his buſineſs to pay without any formal demand on the part of the company. They referred to 1 *Roll. Abr. fo.* 468. *pl.* 6. where it is ſaid, If *A.* is indicted in a leet for an encroachment in the highway, and afterwards *A.* dies and *B.* his heir continues the encroachment, and on this an order is made in the leet that *B.* ſhall reform the encroachment under a penalty of 40*s.*, and for not reforming thereof the lord of the leet brings an action of debt, he need not allege that *B.* had notice of the order made; and *James* v. *Putney*, *Cro. Car.* 498. to the ſame effect. They obſerved that though it was true if any thing were to be done previous to the commencement of the action the declaration muſt allege it to have been done, yet in this caſe the words of the by-law were "ſhall deny, refuſe, or neglect," the laſt of which words clearly did not import that any previous demand need be made; for though no ſuch demaud be made, yet if the party offending does not pay he neglects to pay; that if a demand was not rendered neceſſary by the terms of the by-law it was not required by the declaration, ſince the averment that the Defendant was duly requeſted might be referred to the ſervice of the writ, and that even if the averment could not bear that conſtruction it might be conſidered as impertinent, and therefore need not be proved.

Bayley Serjt. in ſupport of the rule, admitted that where a by-law is ſilent reſpecting any demand, an action of debt may be maintained without a previous demand, but contended that the particular terms of the by-law in queſtion had rendered ſuch demand neceſſary: that although the word *neglect* alone might not

have implied the neceſſity of a demand, yet being coupled with the the words *deny* and *refuſe* it muſt be taken to mean a neglect after demand; and if it could bear that ſignification the Court would be inclined to adopt it in a caſe where the penalty being extremely ſmall, the coſts of an action might exceed that penalty before the Defendant had an opportunity of putting a ſtop to it by paying the ſum forfeited; that ſuch probably was the reaſon why the words "deny, refuſe, or neglect" were introduced by the company into the by-law; he obſerved that this declaration was ſettled by the late Mr. Serjt. *Adair* and the preſent Lord Chief Juſtice of the King's Bench, who had deemed it neceſſary to introduce an averment of a requeſt, from which it may be inferred that they thought a requeſt eſſential, or at leaſt that it was a queſtionable point.

Cur. adv. vult.

There being a difference of opinion among the learned Judges they delivered their judgments this day *ſeriatim*.

CHAMBRE J. As the 1ſt objection taken in this caſe appears upon the record, it is not neceſſary for us to conſider it in this ſtage of the proceedings. The other objection is founded in a ſuppoſed defect of evidence at the trial, the Plaintiff having failed in proving a demand of the penalty. The declaration ſtates a particular requeſt, but if that be unneceſſary it is not contended, nor indeed can it be, that it is any thing more than ſurpluſage. It is urged, however, that though the expreſs words of the by-law may not perhaps have made a demand neceſſary, yet that ſo ſtrong an indication of intent that there ſhould be ſuch a previous demand is manifeſted in the diſpoſition of the words on which this queſtion ariſes as will induce the Court to hold ſuch demand neceſſary. One part of the by-law conſtitutes the offence and gives the penalty; another part declares how that penalty ſhall be recovered. I am not aware, however, that the diviſion of the clauſes affords any inference in ſupport of the Defendant's argument. The ſale of meat on *Sunday* is the offence; the penalty attaches on the commiſſion of that offence, and the whole corporation is authorized to ſue on denial, refuſal, or neglect of payment; on the laſt of theſe terms the whole queſtion turns. Before we deprive theſe words of their proper meaning we ought to be aſſured that they would be ambiguous or repugnant to ſomething elſe, unleſs a meaning were affixed to them different from the ordinary acceptation. *Quoties*

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nulla ambiguitas in verbis, nulla expoſitio contra verba expreſſa fienda eſt. There do not appear to be any three words in the *Engliſh* language more innocent of ambiguity than the words deny, refuſe, or neglect. The word deny certainly implies a previous requeſt, and ſo does the word refuſe, though in ſome forms of pleading indeed the latter has not that ſignification, as where in a declaration it is alleged that the Defendant hath refuſed and ſtill does refuſe. In this caſe, however, I think it does imply a requeſt, but the by-law goes further and adds, if the party offending *neglect*, which means nothing more than if he omit. It has been obſerved that the penalty conſequent upon the offence being very ſmall, if an action were commenced without a previous demand it might create unneceſſary expence. That conſideration, however, cannot induce us to alter the by-law. It is admitted indeed that if no ſuch words had been introduced into the by-law, the Plaintiffs by the general operation of law would have been entitled to recover the penalty without any previous demand. It is true that the company might, if they pleaſed, reſtrain that right, but I do not find a ſingle expreſſion which evidences their intention ſo to do. It is ſaid that the word neglect is qualified by the accompanying words; but is that ſo? The words are disjoined; the meaning is, if the offending perſon deny, or if he refuſe, or even if he neglect to pay, he ſhall be liable to an action. The only objection to this conſtruction is that the clauſe which directs in what manner the penalty ſhall be recovered is thereby rendered nugatory, ſince, according to this conſtruction, the clauſe will have no other effect than would have reſulted from the operation of law. But how does it appear that the corporation of butchers at the time when this by-law was made were acquainted with the rules of law, or even if they were that they meant to deviate from them? There could be no impropriety in ſtating for the inſtruction of their ſucceſſors in what manner the action ſhould be brought, though the directions introduced ſhould amount to nothing more than the law would have authorized. It does not appear to me, therefore, to have been incumbent on the Plaintiffs to prove a previous demand.

ROOKE J. The point on which I have the misfortune to differ in opinion from the reſt of the Court is on the conſtruction of one clauſe in the by-laws of the butchers' company. The company have brought an action of debt againſt the Defendant for a penalty

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of twenty ſhillings, for expoſing meat to ſale on a *Sunday*: they have ſtated in their declaration an actual demand or requeſt made to the Defendant to pay the penalty, and they have failed in proving it. The queſtion between us is, Whether this allegation is mere ſurpluſage, or whether the demand is not made ſubſtantially neceſſary by the terms of the by-law? I think an actual demand is neceſſary. The company are authorized by their charter to make by-laws for the regulation of the trade, not only among their own members, but alſo among all perſons who exerciſe the trade within the city of *London* or two miles thereof. The by-law in queſtion inflicts a penalty of twenty ſhillings, not on all who *ſell* meat on a *Sunday*, but on all who keep open ſhop or offer meat to ſale on a *Sunday*; and it has this clauſe, that if any one ſhall *deny*, *refuſe*, or *neglect* to pay the penalty the ſame ſhall be recovered by action of debt. Now as this by-law affects ſtrangers as well as members of the corporation, ſince it reſpects acts, which are not neceſſarily penal, but are open to explanation, and may be innocent or penal, according as they are explained, and as it inflicts a penalty of twenty ſhillings only, which is much leſs than the mere coſts of a writ, when I am called upon to ſay whether this clauſe, which declares under what circumſtances the action of debt ſhall be brought, has no meaning at all, and is mere ſurpluſage, or whether it has a meaning and is intended for the relief or ſecurity of thoſe who may be charged with offending againſt it, I own I cannot heſitate in delivering my opinion that it ſhould receive the milder interpretation. But if I thought the by-law ſo equivocal as to be fairly open to either interpretation, I ſtill ſhould lean to that expoſition which the company themſelves have put upon it by the form in which they have declared. The words of the clauſe in queſtion are, "if any one ſhall deny, refuſe, or neglect to pay." It is agreed on all ſides that if this clauſe had been omitted, the the offender would have been liable to an action of debt without any previous demand. The queſtion is, Whether theſe words mean only that he ſhall in all caſes be liable to an action, or whether only in caſes of denial or refuſal, or of neglect under particular circumſtances. A man cannot well deny or refuſe till he is charged with an act or requeſted to do it: both theſe words, therefore imply a previous demand. With reſpect to the word neglect, it does not exclude the notion of a prior requiſition, it is not neceſſa-

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rily confined to an omiſſion before demand, for a man may neglect to do a thing after he is requeſted to do it. It is in this reſpect equivocal. A man may neglect to do a thing after requeſt, or he may neglect before. The word therefore being thus equivocal, I think with my Brother *Bayley* (to whom indeed I am indebted for almoſt every argument I can urge in ſupport of my opinion) that it ſhould receive its interpretation according to the company in which it is found, or in other words according to the context. "Deny or refuſe" imply a prior notice: "neglect" may or may not require it according to the intention of thoſe who made the clauſe: then I will give it that interpretation which will make all the words effective and conſiſtent, and not that which will take away all meaning from the two former words, and render the whole clauſe nugatory. By giving this conſtruction to the term "neglect" all the three words will have an effective meaning, for a man may neglect after demand, though he neither denies the fact nor refuſes to pay; he may on receiving notice engage to ſend the money to the officer of the corporation or to pay it within a limited time, and by neglecting to pay it may incur the penalty: and perhaps the corporation had doubts whether under ſuch circumſtances he could be conſidered as denying or refuſing to pay unleſs they made another demand. The framers of this by-law might have very good reaſons for requiring a notice to be given before an action ſhould be brought. The by-law binds themſelves as well as all who ſell meat on *Sunday* within their juriſdiction. Not every ſale was to be penal; caſes of neceſſity might afford an excuſe; the perſons charged might be able to explain the fact if notice was given them; or they might be ready to pay the penalty without incurring the further expence of coſts of ſuit: and if the penalty was paid the corporation could gain nothing more by bringing an action, the ſuit at law could be beneficial only to the clerk or law officer of the company. This clauſe, therefore, may have been framed with the view of making a notice neceſſary, and to ſave offenders from being haraſſed with writs and coſts of ſuit by the clerk of the company if they were ready to pay the penalty. It may be ſaid, if this was their meaning why did they not expreſsly ſay ſo? I anſwer, they have ſaid ſo, very plainly, though not expreſsly, if my interpretation be right: but if the other interpretation is the true one, they have really ſaid nothing that is

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effectual. The clauſe will then have this meaning; whether the perſon charged as an offender denies the fact or not, whether he refuſes to pay or not, is immaterial, if he does not as ſoon as he has ſold meat on a *Sunday* come immediately and pay his twenty ſhillings to the officer, he ſhall be conſidered as guilty of neglect, and ſhall be liable to an action of debt. I do not in my conſcience believe that this was their meaning; the allegation of notice in their declaration warrants me in ſaying they do not ſo underſtand their their own by-law at this day; and I ſee no reaſon why I ſhould join in forcing ſuch an interpretation on them as may be productive of oppreſſion, when the milder interpretation can be attended with no inconvenience worthy attention, for it is as eaſy to give a notice as to ſerve a writ; and the offenders are not in general perſons who are likely to run away to avoid paying twenty ſhillings; they may as eaſily be found after notice as before. I think, therefore, in this caſe there ſhould be a nonſuit entered.

HEATH J. This matter appears to me to lie in a very narrow compaſs. I can add but little to what has been ſaid by my Brother *Chambre*. It ſeems to me that the corporation intended to enumerate every ſpecies of non-feaſance, and having uſed the words deny and refuſe, they ſuperadded another word with a different ſignification. If the word "neglect" was intended to have no other meaning than the two proceeding words why was it added? When words are added to words, they are deſigned to extend the meaning of thoſe firſt mentioned. The law is not very curious in reſpect of demands previous to the commencent of an action. If a bill of exchange be made payable on demand, bringing the action is conſidered as a ſufficient demand. So in *Hope* v. *Colman*, 2 *Wilſ.* 221., to debt on an annuity the Defendant pleaded that it was payable only if perſonally demanded by the Plaintiff, and that the Plaintiff did not perſonally demand it; the Court were of opinion that the demand was not traverſable in that action, though it might have been ſo if an action had been brought upon the covenant. It is true that they alſo obſerve upon the circumſtance of the requiſition that a demand ſhould be made, being introduced in a parentheſis in the deed: which is indeed an abſurd reaſon, and in ſome meaſure diminiſhes the authority of the report.

Lord ALVANLEY C. h. J. I am of the ſame opinion with my Brothers *Heath* and *Chambre*. I conſider the words "if any per-

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ſon ſhall deny, refuſe, or neglect," not as reſtraining the right to bring the action, but merely as deſcriptive of the parties againſt whom the action ſhall be brought in reſpect of the commiſſion of the offence. It is ſaid that great advantage would ariſe from notice being given to the offender; but I can diſcover no advantage which is not counterbalanced by an equal diſadvantage. Hardly any of the ſtatutes which inflict penalties require notice to be given to the parties. The penalty is inflicted by a by-law, of which the Defendant was bound to take notice. Why ſhould the corporation give notice to the offender of their intention to bring an action but to enable him to remove himſelf out of the way? There being no words in the by-law which require notice, I think that an action accrued without it. The word "neglect" muſt be altogether rejected unleſs we give this interpretation to the by-law. That word ſeems to have been inſerted for the purpoſe of making the party liable upon every non-performance, and would be perfectly uſeleſs unleſs that conſtruction were given to it. I think therefore the Plaintiffs ought not to be nonſuited.

Rule diſcharged.

Dann v. Spurrier (a).

The following certificate was ſent to the Lord Chancellor.

This caſe has been argued before us, and we are of opinion that upon the legal conſtruction of the ſaid agreement, the Defendant had not a right to determine the term of 21 years thereby agreed to be granted at the expiration of the firſt ſeven years.

Alvanley.
J. Heath.
G. Rooke.
A. Chambre.

(a) *Vid. ante*, p. 399.

END OF EASTER TERM.

CASES

ARGUED and DETERMINED

IN THE

Court of COMMON PLEAS,

AND

In the HOUSE of LORDS,

IN

Trinity Term,

In the Forty-third Year of the Reign of GEORGE III.

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WYE *v.* FISHER.

June 13th.

A Plaintiff having tendered an iſſue to a plea, and demanded a rejoinder where the Defendant was under terms to rejoin *gratis*, the Court held the judgment regular, but ſet it aſide without coſts, becauſe the Plaintiff might have added the *ſimiliter* himſelf.

IN this caſe, the Defendant having pleaded the general iſſue *Non aſſumpſit*, a plea of bankruptcy, and a plea of ſet-off, the Plaintiff joined iſſue on the two firſt pleas, and tendered an iſſue on the third; he then demanded a rejoinder, though the Defendant was under terms to rejoin *gratis*, and conſequently the Plaintiff was at liberty to have added the *ſimiliter* to the third plea without demanding a rejoinder; the Defendant not having rejoined, the Plaintiff ſigned judgment for want of a rejoinder.

Clayton Serjt. now ſhewed cauſe againſt a rule *niſi* for ſetting aſide the judgment and ſubſequent proceedings thereon, and admitted that of late years a rule had been introduced in favour of Plaintiffs, allowing them, in caſes where the Defendant is under ſuch terms as in the preſent caſe, to add the *ſimiliter* without any demand of a rejoinder; but contended that, this being a rule introduced

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Shepherd Serjt. *contrà*, inſiſted that the judgment was irregular, being ſigned againſt the Defendant for not doing that which the Plaintiff might have done for him. He obſerved, that the Defendant was deceived by the conduct of the Plaintiff; for as he knew the Plaintiff might add the *ſimiliter*, he ſtood ſtill, expecting a notice of trial while the Plaintiff was ſigning judgment againſt him.

The Court were of opinion, that as the rule of adding the *ſimiliter* was introduced for the benefit of Plaintiffs, they had a right *renunciare juri pro ſe introductō*; but as it was not neceſſary for the Plaintiff to have adopted this circuitous courſe, they ſet aſide the judgment and ſubſequent proceedings thereon without coſts.

June 16th. GEORGE BIRCH Eſquire *v.* The Biſhop of LITCHFIELD and COVENTRY, CHARLES OAKES Eſquire, and JOHN HUNT Clerk.

In *quare impedit* the Defendant pleaded that one *M. O.*, under whom he claimed, being ſeiſed in fee of one moiety of the advowſon to preſent to one turn in every two turns, preſented one *J. O.* in her proper turn; that the church, being afterwards vacant, one *J. W.*, under whom the Plaintiff claimed, preſented in his proper turn; that the church being again vacant, the Plaintiff preſented; and that the church being a fourth time vacant, it belonged to the Defendant to preſent. On demurrer to this plea, the Court held that the Defendant had not ſhewn a title to preſent, ſince he had not ſhewn whether the third preſentation was by uſurpation or by agreement, and that it could not be preſumed that the Defendant was entitled to preſent in the firſt and fourth turn, and the Defendant in the ſecond and third, ſince the plea averred that *M. O.* had preſented to the firſt turn in her proper turn, and *J. W.* in his proper turn. *Semb.* that if it had appeared by the plea that the Plaintiff had preſented to the third turn by uſurpation, he would ſtill have been entitled to the fourth turn by right.

QUARE IMPEDIT. The declaration ſtated that the Defendants were ſummoned to anſwer the Plaintiff in a plea that they permit him to preſent a fit perſon to the church of *Handſworth* in the county of *Stafford*, and in the dioceſe of the ſaid biſhop, which was void, *&c.* and alſo to a certain other church of *Handſworth*, *&c.* which was void, *&c.* The firſt count ſtated, that on the 28th of *June* 1776 the Plaintiff was ſeiſed of the advowſon of the church firſt mentioned, as in groſs by itſelf as of fee and right, and being ſo ſeiſed, and the church being vacant, preſented one *Thomas Lane*, his clerk, who was inſtituted and inducted into the ſame, and that afterwards, *viz.* on the 1ſt of *October* 1802, the Plaintiff being ſo ſeiſed thereof, the church again became vacant by the death of the ſaid *Thomas Lane*, and that it belonged to the

Plaintiff

Plaintiff to preſent a fit perſon to the ſaid church, but the Defendant hindered him, &c.

The ſecond count alleged that *John Wyrley* Eſq. on the 9th of *July* 1767, at *Handſworth* in the county aforeſaid, was ſeiſed as of fee and right of three fourth parts of the advowſon of the church ſecondly above mentioned, as in groſs by itſelf; that is to ſay, to preſent to the ſaid church in three ſucceſſive turns in every four turns, the whole into four turns to be divided. And being ſo ſeiſed to the ſame church, being vacant, preſented as in his firſt turn one *John Birch*, his clerk, who, at the preſentation of the ſaid *John Wyrley*, was admitted, inſtituted, and inducted into the ſame in time of peace, in the time of his preſent Majeſty. And the ſaid *John Wyrley* being ſo ſeiſed as laſt aforeſaid, and the laſt mentioned church being full of the ſaid *John Birch*, the incumbent thereof, the ſaid *John Wyrley* afterwards, to wit, on the 11th day of *January* in the year of our Lord 1772, at *Handſworth*, duly made and publiſhed his laſt will and teſtament in writing, and thereby deviſed, among other things, all his eſtate of and in the laſt mentioned advowſon to *G. Birch* Eſq. and his heirs; and afterwards, to wit, on the day and year laſt aforeſaid, at *Handſworth* aforeſaid, in the county aforeſaid, died ſo ſeiſed as laſt aforeſaid, and without revoking or altering his ſaid will, by reaſon whereof the ſaid *G. Birch*, on the death of the ſaid *John Wyrley*, became and was ſeiſed as of fee and right of the ſaid three-fourth parts of the advowſon of the laſt mentioned church as in groſs by itſelf; and the ſaid *G. Birch*, being ſo ſeiſed as laſt aforeſaid, the ſame church afterwards, to wit, on the 28th day of *June* in the year of our Lord 1776, at *Handſworth* aforeſaid, became vacant by the death of the ſaid *John Birch*; whereupon the ſaid *G. Birch*, being ſo ſeiſed as laſt aforeſaid to the ſame church, being ſo vacant as laſt aforeſaid, preſented, as in his ſecond turn, *Thomas Lane*, his clerk, who, at the preſentation of the ſaid *G. Birch*, was admitted, inſtituted, and inducted into the ſame in time of peace, in the time of his preſent Majeſty; and he the ſaid *G. Birch* being ſo ſeiſed as laſt aforeſaid, the ſame church afterwards, to wit, on the 1ſt day of *October* in the year of our Lord 1802, became and was vacant by the death of the ſaid *Thomas Lane*, and yet is vacant; by reaſon whereof it belongs to the gift of him the ſaid *G. Birch* to preſent, as in his third turn, a fit perſon to the ſame church;

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and the said Bishop, *C. Oakes*, and *John Hunt*, do unjustly hinder, &c. to the damage, &c.

The Bishop pleaded that he neither had nor claimed any thing in the said rectories and parish churches, but the admission, institution, &c. as ordinary, &c.

The Defendant *Hunt* pleaded that he did not hinder the Plaintiffs from presenting, &c.

The Defendant *C. Oakes* pleaded two pleas, stating a deed of grant between the said *C. Oakes* and *John Wyrley*, but which was lost by time and accident, by which *C. Oakes* gave to *John Wyrley* the last presentation in exchange for the now right of presentation. On these pleas issues were joined. He then pleaded, thirdly, "That the said *George Birch* ought not to have or maintain his said action against him, because, protesting that the said *G. Birch* never was seised of the whole of the said advowson in the said first count of the said declaration mentioned, or of three-fourth parts of the said advowson in the second count of the said declaration mentioned, the said *C. Oakes* says, that the said church in the said first count of the said declaration mentioned, and the said church in the said second count of the said declaration mentioned, at the said times, when, &c. was and still is one and the same church, and not other or different. And that *Mary Oakes*, deceased, in her lifetime, to wit, on the 24th day of *November A. D.* 1731, was seised of and in one moiety of the advowson of the said church, *to present to the said church one turn in every two turns*, in gross by itself as of fee and right; and the said *Mary Oakes*, being so seised, she the said *Mary Oakes* afterwards, to wit, on the said 24th day of *November A. D.* 1731 aforesaid, presented to the said church, being then vacant, *in the proper turn* of the said *Mary Oakes*, one *John Oakes*, her clerk, who on that presentation was admitted, instituted, and inducted into the church aforesaid, in time of peace, in time of our late Sovereign Lord King *George* the Second, and became the incumbent thereof. And the said *John* being such incumbent, and the said *Mary* being so seised, afterwards, to wit, on the 7th day of *March* in the year of our Lord 1746, at *Handsworth* aforesaid, by a certain indenture then and there made between the said *Mary Oakes* of the one part, and the said *John Oakes* of the other part, (one part of which said indenture, sealed, &c. *profert*) she the said *Mary Oakes*, for the considerations therein mentioned, did give

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and grant unto the ſaid *John Oakes* and his heirs the aforeſaid moiety of her the ſaid *Mary Oakes*, of and in the ſaid advowſon, to have and to hold the ſame unto the ſaid *John Oakes* and his heirs for ever, as by the ſaid indenture more fully appears; by virtue of which ſaid laſt mentioned indenture the ſaid *John Oakes* became and was ſeiſed of and in the ſaid moiety of the ſaid advowſon as of fee and right; and the ſaid *John Oakes* being ſo ſeiſed thereof, afterwards to wit on the 8th day of *June*, *A. D.* 1767, at *Handſworth* aforeſaid, by a certain indenture then and there made between the ſaid *John Oakes* of the one part, and the ſaid *Charles Oakes* of the other part (one part of which ſaid laſt-mentioned indenture ſealed &c. *profert*), the ſaid *John Oakes* for the conſiderations therein mentioned, did give and grant to the ſaid *C. Oakes* and his heirs the aforeſaid moiety of and in the ſaid advowſon, to have and to hold the ſame unto the ſaid *C. Oakes* and his heirs for ever; by virtue of which ſaid laſt-mentioned indenture the ſaid *C. Oakes* became and was ſeiſed of and in the aforeſaid moiety of and in the ſaid advowſon, as of fee and right; and the ſaid *C. Oakes* being ſo ſeiſed thereof, the ſaid church afterwards, to wit, on the day and year laſt aforeſaid, became vacant by the death of the ſaid *John Oakes*; whereupon one *John Wyrley*, Eſq. being then and there ſeiſed of and in the other moiety of the ſaid advowſon, in groſs by itſelf as of fee and right, preſented one *John Birch* to the ſaid church being ſo vacant, *in the proper turn* of the ſaid *John Wyrley*; and the ſaid *John Birch* upon that preſentation was admitted, inſtituted and inducted into the ſame church, and became incumbent thereof; and the ſaid *John Birch* being ſuch incumbent, and the ſaid *John Wyrley* being ſo ſeiſed as aforeſaid, he the ſaid *John Wyrley* afterwards, to wit, on the 11th day of *January*, *A. D.* 1772, at *Handſworth* aforeſaid, duly made and publiſhed his laſt will and teſtament in writing, executed and atteſted as by law is required for paſſing real eſtates, and thereby deviſed the ſaid moiety of the ſaid *John Wyrley*, of and in the ſaid advowſon to the ſaid *G. Birch* and his heirs; and afterwards, to wit, on the day and year laſt aforeſaid, at *Handſworth* aforeſaid, died ſo ſeiſed as laſt aforeſaid, without revoking or altering his ſaid will; by virtue whereof the ſaid *G. Birch* became and was ſeiſed of and in the ſaid laſt-mentioned moiety of the ſaid advowſon, as of fee and right; and the ſaid *C. Oakes* being ſo ſeiſed of the ſaid firſt-men-

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tioned moiety, of and in the ſaid advowſon as aforeſaid, the ſaid church afterwards, to wit, on the 28th day of *June*, *A. D.* 1776, became vacant by the death of the ſaid *John Birch*; whereupon the ſaid *George Birch* then and there preſented to the ſaid church, being ſo vacant, one *Thomas Lane*, his clerk, who upon that preſentation was admitted, inſtituted, and inducted to the ſame, and became the incumbent thereof: And the ſaid church afterwards, to wit, on the 1ſt day of *November*, *A. D.* 1802, became vacant by the death of the ſaid *Thomas Lane*, whereby it then and there belonged, and ſtill belongs to the ſaid *C. Oakes* to preſent a fit perſon to the ſame church, and this the ſaid *C. Oakes* is ready to verify; wherefore he prays judgment if the ſaid *G. Birch* ought to have or maintain his aforeſaid action againſt him, together with his damages according to the form of the ſtatute, in ſuch caſe made and provided, and a writ to the biſhop.

To this third plea the Plaintiff demurred, and aſſigned for cauſes of demurrer, "that the ſame plea doth not diſcloſe any title in the ſaid *C. Oakes* to preſent a fit perſon to the church, in that plea mentioned at the preſent vacancy thereof. And for that it is not alleged, nor does it appear in or by that plea in what right or by what title the ſaid *G. Birch* preſented to the church therein mentioned, the ſaid *Thomas Lane*; nor whether that preſentation was made by virtue or in purſuance of any grant made in that behalf to the ſaid *G. Birch*, or by uſurpation or otherwiſe. And for that the ſame plea alleges the ſaid churches, in the firſt and ſecond counts of the ſaid declaration mentioned, to be one and the ſame church, whereas it was not competent to the ſaid *C. Oakes* to make that allegation; and for that the ſame plea being pleaded as and for a ſpecial plea, yet amounts to the general iſſue as to one of the counts of the ſaid declaration: and for that the ſame plea does not conclude with a traverſe, and is therefore argumentative: And for that the ſame plea is in divers other reſpects defective and informal." The Defendant *C. Oakes* joined in demurrer.

Williams Serjt. in ſupport of the demurrer. The queſtion ariſing upon this demurrer is, Whether, if the Plaintiff and the Defendant *Oakes* are each ſeiſed of a moiety of the advowſon of the church, and each is to preſent to one turn in every two turns, and the Plaintiff has preſented to the two laſt turns, he is not alſo entitled to preſent to this, which is the third turn? According to the ſtatement of the right of

preſen-

preſentation on the plea, the Defendant *Oakes* ſhould have preſented to the laſt turn, and the preſentation of the Plaintiff to that turn which is ſtated to have taken place, muſt now be deemed to have been a preſentation by uſurpation. In *Bro. Abr. tit. Quare Impedit, pl.* 118, where an advowſon deſcended to four co-parceners, and the two firſt preſented in their turn, and then a ſtranger uſurped upon the third, it was held that upon a fourth avoidance, the fourth daughter ſhould not loſe her turn on account of the uſurpation ſuffered by the third daughter. It makes no difference that in this caſe the ſecond turn was uſurped by a perſon not a ſtranger to the church, for with reſpect to that turn he muſt be taken to be a ſtranger. The doctrine of the above caſe is recogniſed by *Willes*, Ch. J. in *Barker* v. *The Biſhop of London*, *Willes*, 659. In *Bro. Abr. tit. Preſentation, pl.* 26. this caſe occurs; *A.* and *B.* having a right to preſent to a vicarage by turns, *A.* whoſe turn it was, ſuffered the right of preſentation to lapſe to the Biſhop, who collated a clerk, upon whoſe death *B.* preſented, and it was held that he had a good right ſo to do; for that *A.* by letting the living lapſe to the Biſhop had loſt his turn. Before the 7 *Ann. c.* 18. an uſurpation not reſiſted would have been concluſive evidence of a right in *quare impedit*; and the party claiming a right of preſentation would, upon the next avoidance, have been put to his writ of right. Had it not been therefore for the proviſions of the ſtatute of *Ann*, the Plaintiff might have claimed the whole advowſon, having been allowed to uſurp upon the Defendant in the laſt turn. Under that ſtatute, however, upon any ſubſequent avoidance the parties are at liberty to litigate the queſtion as if there had been no uſurpation. Soon after the fire of *London*, a caſe aroſe which is applicable to the preſent; *viz. The Biſhop of London* v. *The Mercers' Company*, 2 *Str.* 925. *Fitzg.* 247. There a *quare impedit* was brought by the Company for preſentation to the pariſh church of *St. Mildred Poultry*, and *St. Mary Coleburſt*, in the city of *London*; the declaration ſtated, that both churches were burned down by the fire, and the two pariſhes were united by act of parliament, with right reſerved to the patrons to preſent by turns, and that which had the greateſt endowment to preſent firſt; that *St. Mildred's Poultry*, had the greateſt; that the Plaintiff had the advowſon of *St. Mary Coleburſt*, and the Crown of *St. Mildred*, whoſe church was full of *Richard Perinchief*, clerk; that after the union King *Charles* Second preſented *Richard Perinchief*,

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Perinchief, D.D. who died, and the King preſented *John Williams*, who was inſtituted and inducted, and afterwards promoted to the ſee of *Chicheſter*; that it then belonged to the King to preſent by his prorogative, and he accordingly preſented *George Martin*; and upon his death King *George* the Firſt preſented *Robert Bretton*; and that upon his reſignation the company claimed a right to preſent. The Court held that the Mercers' Company had a right to preſent, becauſe the preſentation by the Crown of *Williams* and *Martin* was but one preſentation, and conſequently the preſentation claimed was the fourth preſentation; though, if thoſe had been conſidered as two preſentations, the Company would not have been entitled to preſent, notwithſtanding all the previous preſentations by the Crown. In this caſe it matters not to the Plaintiff whether the Court ſhall deem the laſt preſentation by him to have been by right or by wrong. If it was by wrong, the caſes ſhew that he has not loſt his right to the third turn, by his uſurpation; and if it was by right it muſt have been by permiſſion of the Defendant *Oakes*.

Bayley Serjt. *contrà*. The argument in ſupport of the demurrer proceeds on the notion that the right of preſentation claimed upon the pleadings is an alternate right of preſentation, *viz.* once in every two turns; but that does not appear to be the right claimed. Nor indeed, if the right claimed were an alternate right, would the law be ſo clearly in the Plaintiff's favour as has been ſuppoſed. The caſe of a preſentation by the Biſhop in the turn of one of ſeveral co-parceners in conſequence of a lapſe, does not ſtand on the ſame ground as a turn uſurped by one of ſeveral co-parceners; in the former caſe the Biſhop's preſentee is virtually the preſentee of the party who ſuffers the lapſe, though nominally the preſentee of the Biſhop, whereas the ſame cannot be ſaid of the preſentee of a party uſurping. In *The Biſhop of London* v. *The Mercers' Company*, the fourth turn belonging to the Company, and the turn in diſpute being the fourth turn, the Court had no other point to decide, and were not bound to conſider the caſe of a party uſurping a turn out of his order. Indeed in *The Grocers' Company* v. *The Archbiſhop of Canterbury*, 2 *Bl.* 770. 3 *Wilſ.* 221. the very point now in diſpute was attempted to be raiſed, but the Court felt it unneceſſary to decide it, intimating, however, that it was not altogether a clear point. But the allegation of the right of preſentation in the Defendant's

fendant's plea does not amount to an allegation of a right to present once in every two turns, beginning by a presentation on the part of the Plaintiff, but only of a right to present once in every two turns. If so, though the Plaintiff by usurpation procured to himself the two last turns, yet as two new turns are now commencing, *non constat* that the Defendant *Oakes* is not entitled to the first of those two turns. The mode of presenting, as well as the right claimed, must be precisely alleged before the Court can determine whose turn the one now in dispute is; and in the old entries, it will be found to be so alleged. Thus in *Winch. Ent.* p. 825, (*a*) *title Quare Impedit*, the right claimed is *quâlibet alternâ vice*, which defines the mode of presenting so far as to exclude the possibility of either party ever presenting twice together. Again, in the same book, p. 684, (*b*) the right claimed is to present four turns in every five turns, viz. "*ad presentandum ad eandem ecclesiam quatuor primis turnis vel vicibus insimul concurrentibus, in quibuslibet quinque turnis vel vicibus proximè concurrentibus vacantibus.*" Where advowsons are in coparcenary, the mode of presenting may be regulated by agreement. Now the fair mode of regulating the right of presentation between two coparceners, would be to give the first of the two first turns to one, and the first of the two second turns to the other; one taking the first and fourth, and the other the second and third turns. Unless it clearly appear upon this record that such is not the mode in which the right of presentation to the church in question is regulated, the Court will not presume against the Defendant *Oakes*, who has already lost one turn.

Williams in reply observed, that the plea had shewn how the turns were to commence, by alleging that *M. Oakes* had presented "in her proper turn;" but that if that had not been the case, still the Court could not presume any other mode of regulating the turns than that which the law imposes, viz. turn and turn, beginning from the eldest, until an agreement of a different nature was shewn; and that none such had been shewn by the Defendant *Oakes*, on whose behalf it should have been pleaded if it existed.

Lord ALVANLEY, Ch. J. The question in this *quare impedit* arises upon the third plea only, and upon that plea I am of opinion that the Plaintiff is entitled to judgment in favour of his demurrer. The plea states that one *M. Oakes* (under whom the Defendant

(*a*) *Ed.* 1680, or p. 715 in the other edition. (*b*) *Ed.* 1680, or 650 in the other edition.

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claims) in 1731 "was seised of and in one moiety of the advowson of the said church, to present to the said church one turn in every two turns, in gross by itself as of fee and right;" and it proceeds to allege that the said *M. Oakes*, in the said year, "presented to the said church, being then vacant, in the proper turn of the said *M. Oakes*." It then alleges that the next presentation was by *John Wyrley*, Esq. (under whom the Plaintiff claims) "in the proper turn of the said *John Wyrley*." What are we to conclude from this statement, but that the predecessors of the present disputing parties had each a moiety of the advowson, and that each presented in succession, which presentations are admitted to be "in their proper turns." Unless some express agreement, shewing a different mode of presentation, be brought before the Court, are we not to presume that course to have been pursued which the law points out, *viz.* that where one party presents to the first turn, he presents to the third turn also. The mode in which the presentations are alleged to have taken place, is evidence of the mode in which they ought to continue to take place; and if there be any existing agreement of a different nature, it ought to have been pleaded. It is too late now to call upon the Court to presume that the party who had the first turn was to have the fourth, and the party who had the second turn was to have the third: any regulation of that kind, arising out of agreement between the parties, should have been stated on the record. The plea then proceeds to deduce the title of the Plaintiff and Defendant, and to shew that the Plaintiff has presented to the two last turns, averring, "whereby it then and there belonged, and still belongs, to the said *C. Oakes* to present a fit person to the said Church." But it does not appear whether the Plaintiff presented to the said turn by usurpation, or by agreement between him and the person whose turn it was to present; and on that point the plea is too loose and uncertain. Supposing the Plaintiff to have usurped upon the Defendant, I do not wish to give any opinion as to what operation that usurpation would have had upon the turn now in dispute, though as at present advised, I think that inasmuch as it was the Defendant's fault for permitting such usurpation, he must suffer for his own negligence. It is not possible to understand this right of presentation as alleged in the plea, to be any other than an alternate right; and it is not shewn whether the Defendant lost his turn last time by the usurpation of the Plaintiff

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or by his own consent. The Defendant, therefore, in this third plea, has shewn no bar to the Plaintiff's claim. 1803.

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Heath, J. I am of the same opinion.

Rooke, J. I am of the same opinion, on the ground that the Defendant's plea is too vague and uncertain.

Chambre, J. I have not much doubt on the principal point, for if the Plaintiff did usurp upon the Defendant, still I think we should hardly say that the Defendant may now usurp upon the Plaintiff by way of retaliation. It is not necessary, however, to consider that point upon these pleadings. The argument respecting the right claimed upon the plea is ingenious, but not sound; if any other than the usual mode of presentation had been agreed upon by the parties, the Defendant should have pleaded that agreement.

Judgment for the Plaintiff

DUMSDAY, Demandant, *v.* Sir RICHARD HUGHES, Bart. and JOHN BEDFORD, Tenants. *June* 20th.

WRIT OF RIGHT. The count was as follows:

In the count of a writ of right it is not sufficient to state that the lands descended to four women, as nieces and coheirs of *J. S.* without shewing how they were nieces. The Court will not give leave to amend the count in a writ of right, unless a favourable case be made out by affidavit.

Suffex, to wit. *John Dumsday*, by *W. C.* his Attorney, demands against Sir *R. H.* Bart. and *J. B.* 10 messuages, 10 cottages, 30 barns, 30 stables, 30 outhouses, 20 gardens, 20 orchards, 500 acres of meadow land, 500 acres of pasture land, 500 acres of arable land, and 200 acres of wood, with the appurtenances, in the several parishes of *Fletching* and *Worth*, in the county of *Suffex*, as his right of inheritance, by writ of the lord the King of right; and thereupon he saith, that *Shadrack Blundell*, late of *East Bergholt*, in the county of *Suffolk*, was seised of the tenements aforesaid, with the appurtenances in his demesne, as of fee and right, in the time of peace in the time of the Lord *George* the Second, late King of *Great Britain*, to wit, within sixty years now last past, by taking the *esplees* thereof to the value, &c. and died thereof seised. And the said *John Dumsday* further saith, that upon the death of the said *Shadrack Blundell*, the right to the said tenements, with the appurtenances, descended and came to one *Mary Bushby* (formerly *Mary Blundell*), one *Elizabeth Blundell*, one *Jane Dumsday* (formerly *Jane Blundell*), and one *Hannah Gregory* (formerly *Hannah Blundell*), as cousins and heirs of the said *Shadrack Blundell*: that is to say, as nieces and co-heirs of one *John Blundell*, who

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was ſon and heir of one *John Blundell*, who was ſon and heir of one other *John Blundell*, who was ſon and heir of one other *John Blundell*, which ſaid laſt-mentioned *John Blundell* was father alſo of one *Nicholas Blundell*, who was father of one *Shadrack Blundell*, who was father of the ſaid *Shadrack Blundell*, laſt-above ſeiſed of the ſaid premiſes as aforeſaid; and from the ſaid *Mary Buſhby*, *Elizabeth Blundell*, *Jane Dumſday*, and *Suſannah Gregory*, the right to the ſaid tenements with the appurtenances deſcended and came to the ſaid *Mary Buſhby*, *Jane Dumſday*, and *Hannah Gregory*, as the ſurviving ſiſters and co-heirs of the ſaid *Elizabeth Blundell*, and from the ſaid *Mary Buſhby*, *Jane Dumſday*, and *Hannah Gregory*, the right to the ſaid tenements with the appurtenances deſcended and came to the ſaid *Mary Buſhby*, *Hannah Gregory*, and the ſaid *John Dumſday* the demandant, as ſurviving ſiſters, ſon, and co-heirs of the ſaid *Jane Dumſday*; and from the ſaid *Mary Buſhby*, *Hannah Gregory*, and the ſaid *John Dumſday* the demandant, the right to the ſaid tenements with the appurtenances deſcended and came to the ſaid *Hannah Gregory* and the ſaid *John Dumſday* the demandant, as the only ſurviving ſiſter, nephew, and heirs of the ſaid *Mary Buſhby*, ſhe the ſaid *Mary Buſhby* having died without iſſue; and from the ſaid *Hannah Gregory*, and the ſaid *John Dumſday* the demandant, the right to the ſaid tenements with the appurtenances deſcended and came to the ſaid *John Dumſday* the now demandant, as nephew and heir of the ſaid *Hannah Gregory*, who was the ſurviving couſin and heir of the ſaid *Shadrack Blundell*, laſt above ſeiſed as aforeſaid; and that ſuch is the right of him the ſaid *John Dumſday* the demandant, he offers, &c. After ſeveral imparlances the following abridgment of the Plaintiff's demand was put in:—

Suſſex, to wit. *John Dumſday*, by *W. C.* his attorney, demands againſt Sir *R. H.* Bart, and *J. B.* 4 meſſuages, 3 barns, 3 ſtables, 4 orchards, and 120 acres of arable meadow paſture and wood land, with the gardens and appurtenances in the ſeveral pariſhes of *Fletching* and *Worth*, in the county of *Suſſex*, as his right of inheritance, by writ of the lord the King of right: And it is to be known that the ſaid *John Dumſday*, in the court of the King here made his demand, in the ſaid writ, of 10 meſſuages, 10 cottages, 30 barns, 30 ſtables, 30 outhouſes, 20 gardens, 20 orchards, 500 acres of meadow land, 500 acres of paſture land, 500 acres of arable land, and 200 acres of wood, with the appurtenances and

now abridges his demand to the ſaid 4 meſſuages, 3 barns, 3 ſtables, 4 orchards, and 120 acres of arable meadow paſture and wood land, with the gardens and appurtenances, &c. To this there was a demurrer, aſſigning for cauſes, "that it does not appear in or by the ſaid count, how or in what manner the ſaid *Mary Buſhby*, *Elizabeth Blundell*, *Jane Dumſday*, and *Hannah Gregory*, were the nieces and co-heirs of the ſaid *John Blundell* in the ſaid count firſt mentioned, and for that the ſaid count is in other reſpects defective, inſufficient, and informal."

Bayley, Serjt. in ſupport of the demurrer, objected, firſt, that the count was defective in not ſhewing how the four perſons named in the ſpecial demurrer were nieces of *John Blundell*; and, ſecondly, that it was not competent to the demandant in this caſe to abridge his demand (*a*). On the firſt point he was proceeding to obſerve, that deſcents are either immediate, as from father to ſon, or mediate, as from uncle to nephew; that in the latter caſe, where ſome one perſon neceſſarily intervenes between the anceſtor and the heir, the demandant is bound to ſtate ſuch intervening perſon, ſince he might poſſibly be ſubject to a diſability which might prevent the deſcent, as alienage, attainder, &c. and cited *Colingwood v. Pace*, 1 *Vent.* 415. when the Court called upon the demandant's counſel to ſupport the count.

Beſt, Serjt. for the demandant, admitted, that the count could not be ſupported, but applied for leave to amend, and cited *Scot* v. *Perry*, 3 *Wilſ.* 206. 2 *Bl.* 758. S. C. where an amendment was allowed in *formedon*, and *Theol. Dig. lib.* 8. *c* 28. *ſ.* 21. where the ſame was permitted in a writ of dower, and urged that it was the conſtant practice to amend in common recoveries, which were in fact real actions.

(*a*) In 14 *H.* 6. 3 *b.* 4 *a. Bro. Ab.* tit. *Abridgement*, *Pl.* 12. *Ivyn*, Ch. J. ſaid, "that in all caſes where the writ is *de libero tenemento*, as in aſſiſe, the writ is *injuſte diſſeiſivit eum de libero tenemento ſuo*; and in writ of dower the writ is *rationabilem dotem quod ei contingit de libero tenemento*, of one *W.* her huſband; and in writ of right of ward, the writ is *cuſtodiam terræ et hæredis*; in theſe caſes, and ſuch like, the demandant may abridge his plaint or demand; and the reaſon is, that although he abridges one acre of land, ſtill the writ is good *de libero tenemento*; but in *præcipe quod reddat*, where certain acres are demanded, there he cannot abridge, for then he would falſify his own writ, and where the writ is acknowledged to be falſe in part, it ſhall abate for the whole; and in aſſiſe *de libero tenemento*, in *A* and *B*, the plaintiff cannot abridge in *B*, for then his writ would be falſe." For more concerning abridgements, ſee *Bro. Ab.* tit. *Abridgement*, and *Booth on real Actions*, p. 295; alſo the ſtatute 21 *H.* 8.

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The *Court* thought that the firſt objection to the count was clearly good, for that the four perſons ſtated to be nieces and coheirs of *John Blundell*, might either be four daughters of one brother or ſiſter of *John Blundell*, or daughters of four ſeveral ſiſters of *John Blundell*: and with reſpect to the amendment, they obſerved, that it was not of courſe to amend, but that the demandant ought to make out a caſe by affidavit; ſaying, that the caſe of dower could afford no authority in a writ of right; it being a maxim that three things are always favoured in law, life, liberty and dower. The *Court* therefore only granted a rule to ſhew cauſe for an amendment. And on a ſubſequent day that rule was diſcharged, on account of the inſufficiency of the affidavit, and judgment was given for the tenants.

June 22d.

TURNER v. EYLES.

In an action of eſcape out of execution, the declaration alleged that the priſoner was, by *habeas corpus*, brought before a judge of K. B. and by him committed to the cuſtody of the marſhal, "as by the ſaid "writ of *habeas* "*corpus*, and "the ſaid "commitment thereon now remaining in "the ſaid "Court more fully appears." Held that evidence of a commitment by a judge of K. B. but not filed of record, would not ſupport the action. Held alſo that the above allegation (even if unneceſſary) muſt be proved as laid.

THIS was an action againſt the Defendant, as warden of the *Fleet*, for an eſcape of a priſoner in execution. The ſecond count of the declaration in which the queſtion aroſe, ſtated, that the Plaintiff, by a judgment of the Court of King's Bench, had recovered a certain debt, together with damages and coſts, againſt one *T. Johnſon*, whereof 67l. parcel thereof was ſatisfied; that the Plaintiff for having execution of the reſidue in *Trinity* Term, 42 *Geo.* 3. ſued a *ca. ſa.* out of the ſaid Court upon the ſaid judgment, directed to the Sheriff of *Middleſex*, who took the ſaid *T. J.* in execution, and detained him in cuſtody by virtue of the ſaid writ, until the ſaid *T. J.* afterwards, to wit, on, &c. by virtue of an *habeas corpus*, was brought before Sir *Soulden Lawrence*, Knight, and then alleged that "thereupon the ſaid *T. J.* was then and there committed by the ſaid Sir *S. Lawrence*, to the cuſtody of the marſhal of the *Marſhalſea* of our ſaid lord the King, there to remain at the ſuit of the Plaintiff, until he ſhould have ſatisfied the ſaid Plaintiff, the ſaid reſidue of the ſaid debt, and damages in the ſaid writ of *ca. ſa.* mentioned as by the ſaid writ of *habeas corpus*, and the ſaid commitment thereon now remaining in the ſaid Court more fully appears." It then further ſtated, that the marſhal detained the ſaid *T. J.* in his cuſtody, charged with the ſaid *ca. ſa.* at the ſuit of the Plaintiff,

Plaintiff, until he was by another writ of *habeas corpus* ſued out of the Common Pleas, brought before Sir *Alan Chambre*, Knight, one of the juſtices of our lord the King of the Bench, and by him committed to the *Fleet*, in execution, until he ſhould ſatisfy the reſidue of the debt, and damages in the ſaid *ca. ſa.* mentioned, as by the ſaid writ of *ca. ſa. habeas corpus*, and return thereof, and commitment thereon, now remaining in the ſaid Court of our ſaid lord the King more fully appears; and that by means thereof the Defendant, being warden of the *Fleet*, had the ſaid *T. J.* in execution for the reſidue of the ſaid debt and damages, until he afterwards voluntarily ſuffered him to eſcape.

At the trial of this cauſe before Lord *Alvanley*, Ch. J. at the *Weſtminſter* ſittings after laſt *Eaſter* term, the Plaintiff, in order to prove that part of the declaration which alleged that *T. J.* was committed to the cuſtody of the marſhal, charged with the *ca. ſa.*, called the marſhal of the King's Bench, who produced the writ of *habeas corpus*, with the commitment of Mr. Juſtice *Lawrence* indorſed thereon, but ſtated that the writ was brought from his own office, not having been filed of record in the Court of King's Bench. Upon this it was objected that the commitment could only be proved by evidence of a commitment, filed of record in the court to which the judge belonged by whom the commitment was made; and even if that were not neceſſary in all caſes, ſtill that the Plaintiff, by the terms in which he had alleged the commitment in his declaration, had tied himſelf up to ſuch proof. Lord *Alvanley* being of this opinion, nonſuited the Plaintiff.

A rule *Niſi* for ſetting aſide this nonſuit having been obtained on a former day,

Shepherd and *Beſt*, Serjts. now ſhewed cauſe. Firſt, a commitment muſt be proved by matter of record. The Court cannot take notice of a party being in cuſtody, unleſs he appear to be ſo by the records of the Court. In *Holland* v. four others, *Cro. Eliz.* 605, the Plaintiff brought an appeal of murder againſt the Defendants by original, at the return of which the Defendants appeared at the bar, whereupon the Plaintiff having diſcovered a fault in the writ, would have declared againſt them *in cuſtodiâ Mareſchalli*: but the Court ſaid "that the appearance of the Defendants did not make them *in cuſtodiâ Mareſchalli*, unleſs there be a record *quod committitur Mareſchallo*, or that they find bail, otherwiſe not."

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In the case of *Wightman* v. *Mullens*, 2 *Str.* 1226, which was an action against the marshal for an escape, the declaration averred a commitment by Sir *William Chapple*, "as by the said commitment may more at large appear." And upon special demurrer, the declaration was holden to be bad, for want of shewing a commitment of record, the Court saying, "he is not in point of law in the marshal's custody until the commitment is entered of record." It is true that in *Wate* v. *Briggs*, 1 *Ld. Raym.* 35. S. C. 2 *Salk.* 565. the same objection was over-ruled on general demurrer; but it may be observed, that the objection could not have prevailed in *Wightman* v. *Mullens*, even upon special demurrer, if the proof of a commitment not of record would have been sufficient to sustain the action. The difference between a general and a special demurrer, only relates to the form of pleading. And whatever omissions may have been made in the pleading, the same proof is always necessary to maintain the action. Thus, if an action be brought upon a judgment, and the plaintiff omit to add *prout patet per recordum*, the Defendant can take no advantage of such omission, unless he demur specially; yet the Plaintiff must prove his judgment by a copy of the record, in the same manner as if it had been alleged to be of record. In this case it was the duty of the Plaintiff to have completed the record before he brought his action; had he done so, the record would have related back to the day on which the prisoner was committed by the judge. In the case of *Kirk* v. *French*, 1 *Esp. N. P. Cas.* 81. which was an action for a malicious arrest, the Plaintiff, in order to prove that the first action was at an end, produced an order of a judge to stay proceedings; and Lord *Kenyon* inclined to think the evidence insufficient. Secondly, the Plaintiff has rendered proof of a commitment of record necessary, by the averment which he has introduced. The distinction between immaterial and impertinent averments is now perfectly settled. If the whole averment might be struck out without destroying the cause of action, the averment is impertinent, and need not be proved. But if the whole cannot be struck out, though a part of it need not have been stated, the averment must be proved as laid. Admitting, therefore, that a *committitur* not entered of record would have been sufficient to support the action, yet as it was necessary to allege a commitment of some sort, and the Plaintiff has thought proper to aver a commitment of record,

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he is not at liberty to prove any other ſpecies of commitment. This diſtinction was acted upon in *Savage* v. *Smith*, 2 *Bl.* 1101; and *Briſtow* v. *Wright*, *Doug.* 665. *ed.* 2. and was recognized by *Lawrence*, J. in *Williamſon* v. *Allinſon*, 2 *Eaſt*, 452.

Vaughan and *Bayley*, Serjts. ſhewed cauſe. Firſt, it was altogether unneceſſary, in this caſe, to aver a commitment of record. There is a diſtinction between thoſe caſes where the Defendant being already in the cuſtody of the marſhal, the Plaintiff afterwards charges him in execution, and thoſe where the Defendant being in execution at the Plaintiff's ſuit, is removed by *habeas corpus* into the marſhal's cuſtody. In the former it is neceſſary to enter the commitment of record, but in the latter it is not. If the Defendant be already in the marſhal's cuſtody, it is neceſſary that the plaintiff ſhould do ſome act in order to ſhew his election to charge him in execution, before he can maintain an action againſt the marſhal for an eſcape. The neceſſity of ſome act being done to ſhew the Plaintiff's election in ſuch caſe was eſtabliſhed in *Watſon* v. *Sutton*, 1 *Salk.* 272, and *Fotterel* v. *Philby*, 3 *Burr.* 1841; and probably the caſe of *Wightman* v. *Mullens*, where it was holden neceſſary on ſpecial demurrer, to add the words *prout patet per recordum*, was a caſe in which the party was in cuſtody before he was charged in execution by the Plaintiff. But where the Plaintiff has completed his execution before the Defendant is committed to the cuſtody of the marſhal, there ſeems to be no reaſon why he ſhould be obliged to enter the commitment of record. The Defendant being legally in execution, the Plaintiff has a right to expect that he will be ſafely kept notwithſtanding any removal by *habeas corpus*. The Plaintiff is no party to the *habeas corpus*, nor has he any notice of it; and as his election to take the Defendant in execution has been made previous to the removal of the Defendant by *habeas corpus*, it ſeems to be equally unneceſſary and unreaſonable to require that he ſhould enter the commitment of record. Secondly, if it was not neceſſary to aver the commitment to have been of record, the averment of a commitment has been ſufficiently proved, for that part of the declaration which ſtates, that the commitment remained in the Court of King's Bench, may be rejected as ſurpluſage. In *Peppin* v. *Solomons*, 5 *T. R.* 496, it was held, that an averment, without which the declaration would be perfect, need not be proved. Now it appears from the caſe of

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Wate v. *Briggs*, that the declaration in this case would have been perfect, if the averment that the commitment remained in the Court of King's Bench had been omitted, for the commitment is only matter of inducement. The cases cited do not apply. With respect to the case in *Cro. Eliz.* though the Defendant was at the bar of the King's Bench, it was not proved by any evidence, that he was committed to the custody of the marshal, and consequently the Court could not take notice that he was in such custody. The contract stated in *Bristow* v. *Wright*, being an entire thing, it was incumbent on the Plaintiff to prove his contract as he had laid it. The case of *Savage* v. *Smith*, was an action by an informer against a sheriff's officer, for exacting illegal fees upon a *fi. fa.*; and as he averred that the *fi. fa.* issued upon a judgment previously described in the declaration, he was bound to prove that judgment, though he need not have stated the judgement at all.

Lord ALVANLEY, Ch. J. It was clearly necessary to prove a commitment of *T. Johnson* to the custody of the marshal. Without an allegation of some legal commitment the declaration would have been bad, and in order to maintain the action that allegation must be proved. If then the whole averment respecting the commitment to the marshal, could not have been struck out of the declaration, the question is, Whether it was not incumbent on the Plaintiff, to prove the commitment as alleged; that is to say, not merely a commitment on paper indorsed by Mr. Justice *Lawrence*, but a commitment remaining of record in the Court of King's Bench? Let us first consider whether a commitment, not of record, would have been a good commitment. I do not understand the distinction which has been attempted as to the necessity of entering on record commitments on *mesne* process, and not entering commitments in execution. It is true that the report of *Wightman* v. *Mullens*, does not state that the commitment was in execution, but only that the party was committed by Sir *W. Chapple* at the suit of the Plaintiff, as by the said commitment may more at large appear. There the Court was of opinion, that a commitment not of record was no legal commitment, and that the Plaintiff might as well have alleged no commitment at all. It does not appear to be material, whether the commitment were on *mesne* process, or in execution; but that case strikes me to be a complete authority, for saying, that the act of a single judge, unless adopted

by

by the court to which he belongs, is of no validity. As the courts do not ſit in vacation, many things are done by the judges individually; but their acts, when recognized, become the acts of the court: and I believe there is no inſtance in which effect has been given to thoſe acts in an action at law, unleſs they have been previouſly put upon the records of the court. The courſe of pleading affords the ſtrongeſt proof of this doctrine, it being the conſtant practice to allege a commitment of record: and in the caſe of *Wightman* v. *Mullens*, the declaration was holden bad upon ſpecial demurrer for want of ſuch an allegation. It is aſked, who is to enter this commitment of record? I ſay the plaintiff is to enter it if he wants to avail himſelf of the commitment, and on his application the Court of King's Bench would compel the marſhal to aſſiſt him in making this entry: for if the act of the ſingle judge be a lawful act, no doubt the Court will not only recognize that act, but do any thing in their power to make it effectual in ſupport of any claims ſought to be derived under it, by perſons entitled to make thoſe claims. I am therefore of opinion, that the allegation of the commitment would have been imperfect, if it had not been an allegation of a commitment now of record. But even if ſuch an allegation had not been neceſſary, (though on this point I ſpeak with great deference to thoſe who are better ſkilled in the ſcience of pleading than myſelf,) ſtill I think the form of the allegation ſuch as to have required proof of a commitment of record; for the plaintiff having ſtated a commitment of a particular kind, was not at liberty to prove a commitment of any other ſpecies, though the particular deſcription might have been unneceſſary. The caſe of *Savage* v. *Smith*, and the other caſes, proceed upon this principle, that where the whole of the allegation is unneceſſary, there it may be ſtruck out. With reſpect to the caſe of *Williamſon* v. *Alliſon*, the knowledge of the Defendant was perfectly immaterial, and in caſe of a *tort* all the aggravation need not be proved. We all know, that if a party derive his right of action againſt the debtor through a variety of deeds, inſtead of charging him generally by virtue of divers *meſne* aſſignments, he muſt prove the deeds as ſtated. So if a party claiming under a demiſe, take upon himſelf to ſtate a demiſe by indenture, he muſt prove his allegation though a general averment of a demiſe would have been ſufficient.

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For theſe reaſons I am of opinion, that even on the ſecond ground the nonſuit ought to be ſuſtained.

HEATH, J. I am of the ſame opinion on both grounds. It is clear that an action for an eſcape cannot be maintained without a commitment; and the firſt queſtion is, Whether it be neceſſary that ſuch commitment ſhould be entered of record, or whether the ſignature of a judge be ſufficient? For certain purpoſes the ſignature of the judge is ſufficient; it is a warrant to the officer to enter the commitment of record. In the ſame manner if a judgment be ſigned, it is ſufficient for certain purpoſes: but if an action be brought upon that judgment, the record muſt be made up and produced. This affords an anſwer to the obſervations which have been made reſpecting the practice of the officer keeping the commitments. He keeps them until they are called for; but when called for he muſt enter them. With reſpect to the ſecond point, as the commitment has been deſcribed in a particular manner, in a neceſſary and material averment, it muſt, according to all the caſes cited, be proved as it has been deſcribed.

ROOKE, J. I am of the ſame opinion upon both points. I am by no means prepared, however, to ſay that it is neceſſary in a declaration of this ſort to aver a commitment of record. It rather appears from ſome caſes that a commitment may be ſtated generally. For if the commitment be ſtated to be of record, it ſhall not be tried by the record, but *per pais*, it being matter of fact not concluſive upon the party. This appears from *Middleton* v. *Manucaptors of Sylveſter*, 1 *Sid.* 216, and *Conny* v. *Jacob*, 1 *Sid.* 220. where it is ſaid, that if a commitment on record were concluſive, it would be in the power of any attorney to make an entry of a commitment on record, though the party were not in cuſtody. The record therefore, not being concluſive, it does not appear to me to be neceſſary to ſtate it in a declaration for an eſcape; but ſtill, whether the commitment be ſo ſtated or not, it muſt be proved by an entry of record as appears from *Rex* v. *Povey*, 1 *Sid.* 237. It is as neceſſary to make the record complete with reſpect to a commitment, as with reſpect to an execution. Before the Plaintiff can maintain an action, he muſt prove a complete title by ſhewing, that the party was in the legal cuſtody of the marſhal, which muſt be by a commitment of record. It is aſked

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who is to make the entry? The answer is, either the Plaintiff must do it himself, or if the marshal should refuse to permit him so to do, he must apply to the Court, who would compel their officer to permit him. Though the officer is allowed to keep the commitments for his own security, he will not be allowed to to keep them as to discharge himself from an action of escape. It seems to me that both reason and authority concur in requiring, that the commitment should be entered of record. If, however, this be doubtful, still I am of opinion, on the second point, that the commitment ought to have been proved as laid. I cannot think that part of an averment can be considered as material, and the other part as surplusage. As the Plaintiff in this case has taken upon himself to state a commitment of record, he was bound to prove a commitment of that description, and having failed to do so, I think that the nonsuit was right.

CHAMBRE, J. I entirely agree with the rest of the Court. In the course of the argument, we have been led to consider the distinction between that which is matter of inducement, and that which is the immediate cause of action. But the cases upon that subject relate merely to the manner of averring different instruments in the declaration; and indeed the language of those cases does not appear to me to be very correct. But although the commitment, in this case, be matter of inducement, it cannot be said to be immaterial; it is as much the foundation of the action as the act of escape itself; it is the first stone in the action. The cases which relate to the necessity of proving particular averments, only distinguish between that which is material and that which is impertinent; but make no distinction between that which is inducement and that which is the immediate cause of action. It is also said in some of the cases, that where matter of fact and matter of record are united in the declaration, the Defendant may blend them upon a plea of *nil debet*. But do those cases say any thing respecting the proof? If a *prout patet per recordum* be not stated, it is merely matter of special demurrer; but though if it be not specially demurred to the declaration is good, still it must be proved. Suppose an action brought on a judgment, and *prout patet per recordum* be omitted; there must, nevertheless, be the same proof given as if it had been stated. Can it be said that a Defendant would not be at liberty to defer the matter of fact, and put his defence upon the want of a

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record? He might refer the iſſue to the Court upon that defect, for there would be no cauſe of action ariſing from the judgment, if there were no record of a judgment. We now come to the queſtion, Whether it be abſolutely neceſſary that the *committitur* ſhould be entered of record before legal evidence can be produced? Several authorities have been cited to ſhew that it is neceſſary, and none have been cited to the contrary. No reaſon has been adduced to ſhew that there is any diſtinction between this act of a judge out of court, and any other order by a judge out of court. Now in all caſes the acts of a ſingle judge out of court muſt be recogniſed by the Court in order to give them validity; nor can they be conſidered to be the acts of the Court until they be entered of record. Perhaps inſtruments of this ſort, are not, ſtrictly ſpeaking, records, but for the purpoſe of the preſent argument they may be ſo conſidered, and whenever circumſtances require that they ſhould be legally proved, they muſt appear to be filed of record. The caſe in *Cro. Eliz.* as well as that of *Wightman* v. *Mullens*, are deciſive of this point; and before we get rid of thoſe authorities, we muſt be furniſhed with ſome principle of law upon which we may decide contrary to them. But though it be ſaid that the commitment is only the act of a ſingle judge, ſtill it muſt be remembered that his act is the act of the Court to which he belongs; and indeed the writ of *habeas corpus* being returnable before the chief juſtice, unleſs the ſingle judge act for the Court to which he belongs, and his act be adopted by the Court, it would ſeem to be without any authority. On this part of the caſe, therefore, I am clearly of opinion that the nonſuit was well warranted. If it were neceſſary to go further, I ſhould ſay that the latter part of the averment, which the Plaintiff contends may be laid out of the caſe, is not capable of being ſeparated from the former part, or treated as an immaterial and diſtinct averment. It is a deſcription of the inſtrument of commitment, and muſt be conſidered in the ſame way as if it had been alleged in an earlier part of the ſentence. The averment amounts to this, viz. that by a record of the Court of King's Bench, *T. J.* was committed to the cuſtody of the marſhal. The latter words being deſcriptive of that which was a neceſſary part of the cauſe of action, how can we vary from that deſcription? The caſes on this ſubject are confined to deſcriptions of contracts, though it has ſometimes been ſaid that a contract is an entire thing

in order to diſtinguiſh caſes of that ſort from others. But an inſtrument of commitment is alſo an entire thing. In *Savage v. Smith* the Plaintiff having deſcribed the *fieri facias* as founded on a particular judgment, and having failed in proving the judgment was nonſuited; for the *fieri facias*, ſo deſcribed, was an entire thing. A ſubſtantial part of the inducement to the action having been alleged, and not proved, the Plaintiff was prevented from recovering. That caſe has been cited with approbation in the King's Bench, and even ſuppoſing it not to be neceſſary that the commitment ſhould be entered of record, I cannot diſtinguiſh that caſe from the preſent. It ſeems to me indeed, that no injury can ariſe to any one from requiring that the commitment ſhould be entered of record. The marſhal, in whoſe poſſeſſion the inſtrument remains, may put it on record if he ſhall have occaſion to make uſe of it, and if it ſhould become neceſſary for any other perſon, ſuch perſon, if the marſhal ſhould refuſe, may apply to the Court, who will compel their officer to do what is right, and when the commitment is once entered of record, it refers to the time of the original order. This nonſuit therefore appears to me to have been perfectly right.

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Rule diſcharged.

SMITH and Another, Aſſignees of R. DRAKE and EBENEZER GODDARD *v.* WILLIAM GODDARD.

June 28th.

A. and B. being partners in trade, *A.* committed an act of bankruptcy, a few days after which *B.* alſo committed an act of bankruptcy. Between the two acts of bankruptcy a clerk of the houſe paid to *C.* a creditor of the houſe, at his requeſt, 558l. and after both acts of bankruptcy 5l. more. The aſſignees, under a joint commiſſion againſt *A.* and *B.* brought an action againſt *C.* to recover theſe ſums of money, and declared, firſt, for money had and received to the uſe of *A.* and *B.* before they became bankrupts; ſecond for money had and received to their own uſe, as aſſignees of *A.* and *B.* after the bankruptcy of *A.* and *B.*, and third, for an account ſtated with them as ſuch aſſignees; *held*, that under this declaration the aſſignees were only entitled to recover the 5l. paid after the bankruptcy of both partners. *Semb.* that if they had declared for money had and received to their uſe, as aſſignees of *A.* they might have recovered one moiety of the 558l. paid between the two acts of bankruptcy.

ASSUMPSIT. The firſt count of the declaration ſtated, that the Defendant, before *R. Drake* and *E. Goddard* became bankrupts, was indebted to the ſaid *R. D.* and *E. G.* for money had and received to their uſe, and being ſo indebted promiſed to pay. The ſecond count ſtated, that after the bankruptcy of *R. D.* and *E. G.* the Defendant was indebted to the Plaintiffs, as aſſignees, for money had and received to their uſe as ſuch aſſignees, and being ſo indebted promiſed to pay. There was alſo a third count, on an account ſtated between the Plaintiffs, as aſſignees, and the Defendant. The Defendant pleaded *non-aſſumpſit*, and gave a notice of ſet-off.

At

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SMITH and another, v. COOPER.

At the trial before Lord *Alvanley*, Ch. J. at the *Weſtminſter* ſittings, after laſt *Hilary* Term, it appeared that *R. Drake* and *E. Goddard* carried on buſineſs in partnerſhip, that *E. G.* committed an act of bankruptcy on the 8th of *February*, 1802, and *R. D.* on the 17th of the ſame month in the ſame year; that a few days previous to the firſt act of bankruptcy, a large ſum of money was paid into the houſe on account of the Defendant; that between the 8th and 17th of *February* ſeveral ſums of money, amounting to 358l. were paid to the Defendant, by a clerk of the houſe, in conſequence of the former having inſiſted on ſuch payment, there being evidence to ſhew that he was acquainted with the inſolvent ſituation of that houſe; that on the 28th of *February* 5l. more were paid to the Defendant; that up to the 17th when *R. D.* became bankrupt, the balance of accounts between the partnerſhip and the Defendant continued to be in favour of the latter, and that the trade continued to be carried on by the bankrupts till the 15th of *March*. The Plaintiffs were aſſignees under a joint commiſſion againſt *R. Drake* and *E. Goddard*. The jury found a verdict for the Plaintiffs for 563l. but liberty was reſerved to the Defendant to move that a nonſuit might be entered, if the Court ſhould be of opinion the the Plaintiffs were not entitled to recover any thing, or that the verdict might be entered on ſuch count, and for ſuch ſum as the Court ſhould think the Plaintiffs entitled to recover.

Accordingly *Praed*, Serjt. obtained a rule *niſi* upon two grounds; firſt, that neither of the counts in the declaration was ſo framed as to entitle the Plaintiffs to recover, becauſe the money being paid to the Defendant after the act of bankruptcy committed by *E. Goddard*, but previous to that committed by *R. Drake*, the Defendant was not indebted to the partners before their bankruptcy, as alleged in the firſt count; nor to the aſſignees after the bankruptcy of both, as alleged in the ſecond count, for *R. Drake* being ſolvent when the money was paid to the Defendant, it was money received by the Defendant to the uſe of the Plaintiffs, as aſſignees of *E. Goddard*, and to the uſe of *R. Drake*. Secondly, that as the balance, when *R. Drake* became bankrupt was in favour of the Defendant, the aſſignees could not recover on any demand prior to *R. Drake*'s bankruptcy, ſince the 5 *Geo.* 2. *c.* 30. *ſ.* 28. directs the aſſignees to ſtrike a balance when there have been mutual debts or credits, and that balance muſt be taken at the time when both

partners become bankrupts, and that at all events therefore, the Defendant must be allowed the money received by the bankrupts on his account, before the bankruptcy of either.

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Best, Serjt. now shewed cause. The authority of the clerk who paid the money to the Defendant, having been derived from the partnership of *Goddard* and *Drake*, and that partnership having been dissolved by the act of bankruptcy of the former, the money must be considered as having been paid without authority, and ought therefore to be refunded. At all events, however, the Plaintiffs are entitled to recover one moiety of the 55*l.* paid subsequent to the bankruptcy of *E. Goddard*, as well as the 5*l.* paid after the bankruptcy of *Drake*. The ground upon which one of two partners in trade is authorised to dispose of the partnership effects, is that of implied agency. Though one tenant in common of a personal chattel be entitled to take possession of the whole, yet he cannot convey more than a moiety of the interest; if therefore, one of two partners become bankrupt, as the partnership is thereby dissolved (*a*), no agency can any longer be implied; consequently the solvent partner can dispose of no more than his moiety of the property. Upon the bankruptcy of *E. Goddard*, therefore, a moiety of the partnership property passed to his assignees, who became tenants in common with the solvent partner. The assignees, under a joint commission, are entitled to the joint and separate property of both partners; they have no specific character as assignees of each partner, but if any property belonging to one of the partners has been made away with, they will be entitled to sue for it as assignees, under a joint commission. Nothing more is necessary to be shewn, than that the property was vested in them at the time the action was brought. Nor can there be any set-off under the statute in this case; for the debt, upon which the Plaintiffs sue, arose subsequent to the act of bankruptcy of *E. Goddard*, whereas that which the Defendant claims, was incurred previous to that event. If a set-off were allowed in such case, the effect would be to enable one bankrupt partner, after an act of bankruptcy committed by himself to pay a partnership debt to a favourite creditor, without the possibility of the assignees obtaining redress; for to any action brought by the assignees, a set-off arising out

(*a*) See *Smith* v. *Sickes*, 1 *East*, 363; and *Smith* v. *Auriol*, *Id.* 368.

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of the ſtate of accounts between the creditor and the two partners would be reſorted to as equivalent to the whole demand.

Praed, Serjt. *contrà*. The 5 *Geo.* 2. *c.* 30. *ſ.* 28. directs, that when there have been mutual debts or credit between the bankrupt, and any other perſon, before the time of the bankruptcy, an account ſhall be taken, and the balance only ſhall be paid. Theſe mutual claims are not in the nature of ſet-off; but the balance only is the debt. If then an account is to be taken up to the time of the act of bankruptcy, the Plaintiffs in this caſe are not entitled to recover any thing. For at the time when *Drake* became bankrupt, the balance of accounts ſtill remained in favour of the Defendant. It is true that the ſtatute does not expreſsly direct up to what time the account ſhall be taken, where ſeveral partners become bankrupt: but in the caſe of a joint commiſſion, the act of bankruptcy by which the commiſſion is ſupported, and under which the aſſignees are authoriſed to ſue, is not complete, until all the partners have become bankrupt. If the aſſignees claim the money paid to the Defendant as a debt due to the eſtate of *Goddard* and *Drake*, they muſt allow in account all ſums of money due from the eſtate to the Defendant. If on the other hand they claim one moiety of the money paid as due to the ſeparate eſtate of *E. Goddard*, and the other moiety as due to the ſeparate eſtate of *Drake*, they ought to have framed their declaration accordingly. Indeed, in ſuch caſe the two demands could not be joined in the ſame action. Where two perſons have demands upon a third in ſeparate rights, they ought to ſue ſeparately; *Graham* v. *Robertſon*, 2 *T. R.* 282. Nor will it make any difference if both creditors become bankrupt, and the ſame aſſignees be choſen for both. For where two commiſſions iſſued againſt *A.* and *B.* and the ſame perſons being choſen aſſignees under both, brought an action againſt *C.* for debts due to the ſeparate eſtates of each; it was holden that ſuch debts ought to have been made the ſubject of diſtinct actions; *Hancock* v. *Hayward*, 3 *T. R.* 433.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord ALVANLEY, Ch. J. This is an action for money had and received, brought by the Plaintiffs as aſſignees of two perſons in partnerſhip, and the money in diſpute was paid by the perſon who acted as clerk in the partnerſhip concerns after an act of bankruptcy committed

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mitted by one of the perſons, but before an act of bankruptcy committed by the other. With reſpect to the 5*l.* paid after the bankruptcy of both, the Plaintiffs are clearly entitled to a verdict for that ſum; and the only queſtion we have to decide is, Whether the aſſignees can recover the money in diſpute under a count for money had and received to the uſe of the Plaintiffs, as aſſignees of both parties? Another queſtion has been raiſed in this caſe, which it will be for us to decide, ſhould it be brought before the Court upon another occaſion. We are of opinion, that in this caſe it is not poſſible to contend with ſucceſs, that the Plaintiffs ought to recover in the way in which they have declared. No doubt the Plaintiffs are joint aſſignees of both the partners, and as ſuch they might have ſued for money had and received to the uſe of each; and if there had been a count for money had and received to the uſe of the Plaintiffs as aſſignees of the partner who had committed an act of bankruptcy at the time the money was paid, they might perhaps have recovered one moiety. On this, however, we do not mean to give an opinion. It is clear that after the bankruptcy of *Goddard*, the clerk was the agent of ſuch perſons as ſhould be choſen aſſignees of his eſtate, as well as of *Drake*, who was then abſent. But we think that upon the preſent declaration there is no pretence for ſaying that the Plaintiffs ought to recover.

Per Curiam, Let a verdict be entered for 5*l.*

SCOTT and Others, Aſſignees of BERKLEY, a Bankrupt, *v.* PETTIT. *June* 28th.

TROVER for goods. The cauſe was tried before Lord *Alvanley*, Ch. J. at the *Guildhall* ſittings, after laſt Eaſter Term, when the following facts appeared in evidence:

The goods in queſtion had been ordered by the bankrupt who was a merchant in London, of Meſſrs. *Wallers* of *Mancheſter*, and were forwarded by them, directed to the Bankrupt at the *Bull* and *Mouth* Inn, on the 16th of *March* 1802. On the 23d of *March*

On the 16th of *March* 1802, goods were forwarded from *Mancheſter*, addreſſed to *A* at the *Bull* and *Mouth* Inn London, in conſequence of a previous order from him. On the 23d of the ſame month, the goods were ſent to the Defendant's houſe as the packer of *A*, the latter having given no direction at the *Bull* and *Mouth* Inn reſpecting theſe particular goods; but having given a general order that all goods addreſſed to him ſhould be ſent to the Defendant; *A* having no warehouſe of his own. On the 11th of *March A* committed an act of bankruptcy. When the goods arrived at the Defendant's they were booked to the account of *A*, and the Defendant not knowing of *A*'s bankruptcy, unpacked the goods to aſcertain the contents. On the 31ſt of *March* the goods were claimed by the conſignor, and on the day after by the aſſignees of *A*. againſt whom a commiſſion had been taken out. Held that the *tranſitus* of the goods was at an end when they arrived at the Defendant's houſe; and conſequently, that the Plaintiffs, as the aſſignees of *A*., were entitled to recover them in an action of trover.

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the goods were sent from the *Bull* and *Mouth* Inn to the Defendant's house, who was a packer, not in consequence of any orders respecting those particular goods, but in consequence of a general order from the bankrupt to send all goods directed to him to the Defendant's house. On the 11th of *March*, the bankrupt, who lived in lodgings and had no warehouse of his own, absconded, leaving no clerk to accept goods or orders for him. On the arrival of the goods at the Defendant's house, they were booked for the account of the bankrupt; and the Defendant not knowing that the bankrupt had then absconded, and not having any directions from him respecting the goods, caused them to be unpacked with a view to ascertain of what they consisted. On the 31st of *March*, Messrs. *Wallers* having learned the situation of the bankrupt's affairs, claimed the goods from the Defendant, and on the day after they were demanded by the assignees. The Defendant being indemnified by Messrs. *Wallers*, refused to deliver the goods to the Plaintiffs. The jury found a verdict for the Plaintiffs, but liberty was reserved to the Defendant to move for a new trial, or that a nonsuit might be entered.

Best, Serjt. having accordingly obtained a rule *nisi* on a former day, was now called upon to support his rule. When this rule was obtained, two grounds were suggested, 1st, that as the goods were not sent from *Manchester* till after the bankruptcy of *Berkley*, his bankruptcy might be deemed a revocation of the previous order, and consequently, that no right vested in the Plaintiffs. [This point he now abandoned, saying, that though suggested by the Lord Chief Justice before whom the case was tried, yet he felt it too late, after the many decided cases in which a similar circumstance had occurred, without effecting any alteration in the right of the assignees of the bankrupt to claim goods on their arrival, to make this objection, however desirable it might be to establish a different rule from that which had hitherto prevailed]. 2dly, That the *transitus* of the goods was not at an end when they were demanded by Messrs. *Wallers*. Before the right to stop *in transitu* can be defeated, it must appear that the goods have come to the possession of the vendee. It is true, that in *Ellis* v. *Hunt*, 3 *T.R.* 464, where the *transitus* was holden to be at an end, the assignees of the vendee had not taken actual possession, but the messenger under the commission had done an act which was equivalent to taking possession, by put-

ting his mark upon them. In *Hunter* v. *Beale*, cited in the above case, it was determined, that the vendor had a right to ſtop goods which remained in the cuſtody of the carrier, though the vendee having received notice of their arrival, had given orders to the carrier reſpecting the diſpoſal of them, and though the carrier himſelf had done ſome acts towards carrying thoſe orders into execution. So in *Hunt* v. *Ward*, alſo cited in *Ellis* v. *Hunt*, where goods had been ſent by orders from the vendee to a packer, the latter was conſidered as a middle man between the vendor and vendee. Though a packer be the agent of a vendee, yet he is not ſuch an agent as can receive the goods into the ſtock of the vendee. In the caſe of *Hodgſon* v. *Loy*, 7 *T. R.* 440, where goods remained in the hands of a wharfinger, it was held that the right to ſtop *in tranſitu* continued, though the wharfinger had general directions from the vendee to forward ſuch goods as ſhould be received on his account to a particular perſon. Both a wharfinger and a packer receive goods for the mere purpoſe of forwarding them to their ultimate deſtination; and therefore while they remain with them the *tranſitus* is not at an end.

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Shepherd and *Bayley*, Serjts. *contrà*, were ſtopped by the Court.

Lord ALVANLEY, Ch. J. At the trial I could not help forming a wiſh, that the queſtion, how far the bankruptcy of *Barclay* had operated as a countermand of his previous orders to Meſſrs. *Wallers*, ſhould be conſidered by the Court. But on looking into the caſes, I find that queſtion to be completely cloſed in *Weſtminſter Hall*, and that we therefore are bound to hold that, though a bankrupt has altogether ceaſed to be a trader, yet that his warehouſe continues open for the purpoſe of receiving goods; and that the aſſignees have a right to take poſſeſſion of every thing that may come into their hands without paying a ſingle farthing, even though the conſignors of the goods are not entitled to come in under the commiſſion. In *Ellis* v. *Hunt*, Lord *Kenyon* ſays, that it never had been decided, that bankruptcy was of itſelf a countermand of an order; and in *Bohtlingk* v. *Inglis*, 3 *Eaſt*, 381, the goods in queſtion were not delivered on board the ſhip which was to bring them from *Ruſſia* to the conſignee in London, until after the conſignee had committed an act of bankruptcy. No doubt, therefore, for the purpoſe of receiving goods, the aſſignees ſtand in the place of the bankrupt. The next queſtion is, Whether, under

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the circumſtances of this caſe, the delivery of the goods to the packer, is to be conſidered as a delivery to the bankrupt? Undoubtedly there are caſes in which packers and wharfingers are to be conſidered as middle men; but there may always be ſo a queſtion, Whether in the particular caſe they are to be ſo conſidered or not? Such was the queſtion in *Richardſon* v. *Goſs* (*a*), and in *Mills* v. *Ball* (*b*). In the laſt of thoſe caſes, we held the wharfinger, at *Exeter*, to be merely a middle man; for though he paid the freight and charges up to that place, yet he was not authoriſed to impeach them or meddle with them, but was only one of the hands by which the goods were to be forwarded to *North Tawton*, the place of their ultimate deſtination. In the caſe of *Richardſon* v. *Goſs* (*c*), it was not neceſſary for us to decide, whether the wharfinger was a middle man or not, for the caſe was decided on the ground, that the conſignee of the goods had countermanded his order; but my brother *Chambre* intimated in his opinion, and I perfectly agreed with him at the time, that if a man be in the habit of uſing the warehouſe of the wharfinger as his own, and make that the repoſitory of his goods, the *tranſitus* will be at an end when the goods arrive at ſuch warehouſe. I take the caſe of the packer, cited in *Ellis* v. *Hunt*, to amount to no more than this; that if a man living at a diſtance, or living abroad, order goods to be ſent to *A. B.* his packer, in order that *A. B.* may hand them on to him; in ſuch caſe *A. B.* is a mere middle man with reſpect to the right of ſtopping *in tranſitu*. And in *Leeds* v. *Wright* (*d*), we held that the goods, though remaining in the packer's cuſtody, had arrived at the end of their journey; for the packer in that caſe, was not merely a middle man. In this caſe it ſeems to me impoſſible to raiſe a doubt, whether the *tranſitus* was at an end or not; for if the bankrupt had no warehouſe to receive the goods, but that of the packer, the *tranſitus* never could be at an end, if it did not end there. Under all the circumſtances of the caſe, I am clearly of opinion, that the conſignees were not entitled to conſider the Defendant in the light of a mere packer, and to ſtop the goods in his cuſtody.

HEATH, J. It is much to be lamented, that goods conſigned to a bankrupt which arrive after the act of bankruptcy, as in this caſe, ſhould ever be conſidered as part of the bankrupt's effects.

(*a*) *Ante*, p. 119. (*b*) *Ante*, vol. 2. p. 457. (*c*) *Ante*, p. 119. (*d*) *Ante*, p. 320.

The hardſhip to which this rule of law had given riſe, in particular caſes, was the occaſion of introducing the doctrine of ſtoppage *in tranſitu*. The very expreſſion "ſtoppage *in tranſitu*," *ex vi termini* implies that there muſt be a place of ultimate delivery of the goods. If the bankrupt, in this caſe, had poſſeſſed a warehouſe of his own, and the packer had merely taken them as a middle man, the conſignors might have ſtopped them. But here there being no other place of delivery than the warehouſe of the packer, the goods, when arrived there, had come to their laſt place of delivery, and conſequently were no longer liable to the right of ſtoppage *in tranſitu*.

ROOKE, J. I am of the ſame opinion. I exceedingly regret that ſuch a rule of law ſhould have been adopted, as that which veſts in the aſſignees of a bankrupt the property in goods which arrive after the bankruptcy; for it appears to me to be productive of very great hardſhips. But the caſes are too deciſive upon the ſubject for the Court now to adopt a contrary doctrine. In all the caſes where the conſignor has been allowed to ſtop the goods, in the cuſtody of the packer, there has been a place of ulterior delivery in view. In the preſent inſtance, there was no place of delivery but the warehouſe of the packer. The delivery therefore to the packer, was equivalent to a delivery to the bankrupt himſelf.

CHAMBRE, J. I am entirely of the ſame opinion. If the warehouſe of the packer were not to be conſidered as the place of delivery to the bankrupt in this caſe, there could be no place of delivery at all; for the bankrupt had no other opportunity of receiving goods, but by the hands of the Defendant. However hard the law may in general be thought, which veſts the property in goods which arrive after an act of bankruptcy in the aſſignees of the bankrupt, it would be ſtill more hard in the preſent inſtance, if the creditors were not permitted to reſort to the property in the hands of the Defendant, ſince he could have no ſtock in his own poſſeſſion. The creditors of a trader generally know whether he has goods in his poſſeſſion, and truſt him accordingly; and the creditors of this bankrupt probably knew that he conſidered the warehouſe of his packer as his own, and that the goods were conſigned to him there. In thoſe caſes, where the *tranſitus* of the goods has not been conſidered as at an end, the goods have only remained with the packer for the purpoſe of being forwarded to

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the ſame ulterior deſtination. In this caſe there was no ulterior deſtination, the *tranſitus* was at an end.

Rule diſcharged.

June 27th.

DYSON and Others *v.* ROWCROFT.

Policy on fruit from *Cadiz* to *London*, with the uſual memorandum. In the courſe of the voyage the fruit was ſo much damaged by ſea-water, that it became rotten, and ſtunk; and on the ſhip's arrival at an intermediate port, into which ſhe was driven, the government of the place prohibited the landing of the cargo. The ſhip alſo being too much damaged to proceed on the voyage, was ſold, and the cargo neceſſarily thrown overboard. Held that the aſſured were entitled to recover for a total loſs.

THIS was an action on a policy of inſurance, which came on to be tried before Lord *Alvanley*, Ch. J. at the ſittings after laſt *Hilary* Term, when the jury found a verdict for the Plaintiffs for 225*l.* ſubject to the opinion of the Court on the following caſe.

On the 28th of *March*, 1802, the Plaintiffs effected a policy of inſurance on fruit at and from *Cadiz* to *London*, upon the ſhip *Tartar*, and the Defendant ſubſcribed the policy for 225*l.* The policy contained the uſual memorandum, that corn, fiſh, ſalt, fruit, flour, and ſeed, were warranted free from average, unleſs general, or the ſhip ſhould be ſtranded. The Plaintiffs were intereſted in the fruit to the amount of the ſum inſured. The *Tartar* ſailed upon the voyage inſured, with the fruit on board, on the 15th of *February*, 1802, but having met with tempeſtuous weather and contrary winds, was forced to put into *Palma*, and afterwards into *Santa Cruz*, where ſhe arrived on the 3d of *May*. In the courſe of this voyage, the fruit received ſuch damage from the ſea-water, that on its arrival at *Santa Cruz*, it was rotten, and ſtunk to ſo great a degree, that the government there probibited the landing it, and it was therefore thrown overboard. The ſhip was alſo ſo much damaged in the courſe of the voyage, as to be unable to proceed upon the voyage, and was neceſſarily ſold. The queſtion for the opinion of the Court was, Whether the Plaintiffs were entitled to recover?

Beſt, Serjt. for the Plaintiffs. The cargo, in this caſe, having been ſo entirely deſtroyed through ſea-damage, as to render it neceſſary that it ſhould be thrown overboard, the Plaintiffs are entitled to claim for a total loſs. The memorandum in the policy, which declares that fruit ſhall be free from average, unleſs the ſhip be ſtranded, applies only to caſes where the commodity ſuffers deterioration; but where the whole value of the commodity is deſtroyed, by any of the perils inſured againſt, the loſs is total in its

nature, and consequently not within the memorandum. In this case, not only was the cargo destroyed, but the ship itself was sold, in consequence of the damage sustained at sea; which circumstances distinguish the present case from that of *Cocking* v. *Fraser*, *Park.* 114.; for as the case there states that the ship did not proceed to *Figara*, the place of her destination, it may be inferred that she was able to proceed; and indeed it does not appear that there was any thing to prevent the cargo being carried to the port of discharge. In *M'Andrews* v. *Vaughan*, *Park.* 115, where, after capture and re-capture, a cargo of fruit was brought to the port of destination, but had sustained damage to the amount of 80 *per cent.*, Lord *Kenyon* said, that to entitle the assured to recover, either the voyage must be lost, or the cargo wholly and actually destroyed. Now here, if it be contended that the cargo was not wholly and actually destroyed, by a peril insured against, still the voyage was lost Indeed Lord *Kenyon*, in the case of *Burnett* v. *Kensington*, 7 *T.R.* 222, observes, that he cannot subscribe to the *dictum* of Lord *Mansfield* in *Cocking* v. *Fraser*, that if the commodity specifically remain, the underwriter is discharged.

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Bayley, Serjt. for the Defendant. The object of the memorandum was to exempt the underwriters from particular average, unless the ship be stranded; but if a stranding take place, they are as much liable to particular average as if the memorandum had not been introduced, and the observation of Lord *Kenyon*, in *Burnett* v. *Kensington*, upon the case of *Cocking* v. *Fraser*, is founded upon that distinction; for if the ship be stranded, the underwriters are equally liable, whether the cargo remain in specie or not. The distinction therefore, between a total and a partial loss, as taken in *Cocking* v. *Fraser*, remains unimpeached; if the thing insured be absolutely destroyed, it is a total loss; but if it specifically remain, though of no value, it is an average loss. Though it might be necessary in the present case, to throw the cargo overboard, it does not appear that such necessity arose from any of the perils insured against. When the ship arrived at *Santa Cruz*, the cargo was in existence, and the act of the crew in throwing it overboard, cannot vary the respective rights of the assured and the underwriter. In *Cocking* v. *Fraser*, though the ship did not proceed to her place of destination, and the cargo was so much damaged as to be rendered

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of no value in the middle of the voyage, ſtill the aſſured were not allowed to recover. That caſe, therefore, is deciſive of the preſent.

Lord ALVANLEY, Ch. J. If I underſtand the policy as reſtrained by the memorandum, the underwriter agrees, that all commodities ſhall arrive ſafe at the port of deſtination, notwithſtanding the perils inſured againſt; but that he will not be liable to pay for any partial loſs on fiſh, or the other articles contained in the memorandum, becauſe thoſe commodities being liable to deterioration from many circumſtances independent of the peril inſured againſt, he would continually be haraſſed with claims for partial loſs alleged to have ariſen from the perils mentioned in the policy. Unleſs therefore the conſequence of the damage ſuſtained be the total loſs of the commodity, the underwriter does not agree to be anſwerable; but if the commodity be totally loſt to the aſſured, he undertakes to pay. If this be not the meaning of the memorandum, it is badly expreſſed; and the underwriters would have done better if they had ſaid, that they would not be anſwerable unleſs the commodities enumerated actually went to the bottom. The queſtion is, What is a total loſs? I admit that the circumſtances of caſes like the preſent are generally ſuſpicious. If the voyage be protracted, deterioration neceſſarily takes place; and it becomes the intereſt of the captain and mariners to turn the injury into a total loſs. But this is matter for the conſideration of the jury. We ought, indeed, to look at the caſe with ſome ſuſpicion, where there is ſo much temptation to throw the cargo overboard. But here it is found that the neceſſity of ſo doing aroſe from ſea-water ſhipped during the courſe of the voyage; and that the commodity was in ſuch a ſtate that it could not be ſuffered to remain on board conſiſtently with the health of the crew. In conſequence of this neceſſity, therefore, the commodity was annihilated, by being thrown overboard. Had it not been ſo annihilated, it would have been annihilated by putrefaction: and is it not as much loſt to the aſſured by being thrown overboard, as if the captain had waited until it had arrived at complete putrefaction? The caſe of *Cocking* v. *Fraſer* was the only thing which raiſed any doubt in my mind; and it is certainly a very ſtrong caſe. But the authority of that caſe is much ſhaken by the obſervation of Lord *Kenyon* upon it, in *Burnett* v. *Kenſington*,

ton. I ſuſpect that the words "of no value," applied to the cargo in the caſe of *Cocking* v. *Fraſer*, are ſomewhat too large, and that the fact was not that the cargo was in ſuch a ſituation as to make it impoſſible to preſerve it, but that it was ſo much damaged as to be no longer valuable to the owners, becauſe it was not worth carrying to the port of deſtination. Lord *Kenyon*, ſpeaking of *Cocking* v. *Fraſer*, ſays, that he cannot ſubſcribe to the opinion there given, that "if the commodity ſpecifically remain, the underwriter is diſcharged" (*a*): I think myſelf therefore at liberty to conſider the caſe of *Cocking* v. *Fraſer*, as ſomething leſs ſtrong than it appears to be. The queſtion then is, Whether the loſs which has happened be not as much a total loſs as if the waves had carried the cargo overboard, or as if it had been directly prevented from arriving at the port of deſtination, by ſome of the perils inſured againſt? I never have underſtood that the underwriters inſure fiſh againſt no perils which do not end in a total annihilation of the commodity. When the loſs ariſes from capture, the commodity remains in exiſtence in the hands of the enemy; and yet this loſs is as much within the policy as a loſs ariſing from the wreck of the ſhip. I muſt now take it, that the circumſtances under which the cargo in this caſe ſtood, were ſuch that ſea-damage had ſo operated as to make it impoſſible for the captain to keep it any longer on board. Whether the cauſe of the loſs were direct or indirect, it produced a total annihilation of the commodity.

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HEATH, J. On looking over this caſe, it appears to me, that it is not ſo ſtrongly ſtated on the part of the aſſured as the facts would have warranted; for it is not ſaid that the cargo was neceſſarily thrown overboard. Now it is clear that it was neceſſary the ſhip ſhould be repaired, and that the *Portugueſe* government would not ſuffer it to be landed; yet the ſhip could not be repaired unleſs the cargo was removed. The evidence, therefore, appears to me to warrant the concluſion that the cargo was neceſſarily thrown overboard. On this ground I have no difficulty in concurring in opinion with my Lord, that the caſe does not fall within the exception of the memorandum, and is not governed by the caſe of *Cocking* v. *Fraſer*. Had we thought it the ſame in circumſtances as *Cocking* v. *Fraſer*, it would have been neceſſary

(*a*) See *Marſhall*, p. 144.

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for us to consider how far that case has been impeached by the subsequent observations of Lord *Kenyon* in *Burnett* v. *Kensington*.

ROOKE, J. We must now take it from the facts stated in this case, that the cargo was so deteriorated as to make it necessary that it should be thrown overboard. The loss therefore was total; the voyage was defeated, the ship was unable to proceed, and the government of the island would not suffer the cargo to be landed. The injury was occasioned by tempestuous weather; the loss was total, and therefore I think the Plaintiff entitled to recover.

CHAMBRE, J. The case is not stated so strongly as the evidence seems to warrant. It is said that the cargo stunk so much that the government of the country prohibited its being landed; but it might have been stated that it was inconsistent with the health of the crew that it should remain on board, or that it was necessarily thrown overboard. The ship is expressed to have been so much damaged that she could not proceed, but was sold; now this must certainly have made a complete end of the voyage. We do not construe special cases so strictly as we do special verdicts; on the whole, therefore, it seems to me that the loss was total; and though the cargo might be said to exist in specie, yet in value it did not exist at all. If that be so, the inference of law is plain. What is it against which the underwriters protect themselves, by the memorandum? against partial damage. For what reason? because as the commodities enumerated are perishable in their nature, it might be impossible to ascertain, with exactness, what part of the loss arose from the nature of the commodity, and what from sea-damage. If ever there was a case of total loss, it certainly is the present.

Lord ALVANLEY, Ch. J. then observed, that the Court considered the case, as stating, that the cargo was necessarily thrown overboard.

Judgment for the Plaintiff.

LEATHAM and Others, Executors of LEATHAM, v. TERRY. *June* 29th.

THIS was an action for money had and received, which came on to be tried before Lord *Alvanley*, Ch. J. at the ſittings after laſt *Hilary* Term, when the jury found a verdict for the Plaintiffs, damages 100*l.* ſubject to the opinion of the Court on the following caſe:

On the 29th of *October* 1800, the Defendants, being part-owners of the ſhip *Mancheſter*, on behalf of themſelves and the other owners, effected a policy of inſurance on the freight of the ſaid ſhip, at and from *St. Peterſburgh* to the ſhip's port of diſcharge, between *Peterhead* and the *Downs*, with liberty to the aſſured to value the ſame; but no valuation was at any time made, nor was any other inſurance effected on the freight. The policy was for 500*l.* and the Plaintiffs' teſtator ſubſcribed it for 100*l.* The Defendants had previouſly inſured the ſhip for 3000*l.* at which ſum ſhe was valued in the policies at and from *Hull* to *Peterſburgh*, and at and from thence back to any port between the *Frith of Forth* and the *Downs*. The ſhip ſailed from *Hull*, and arrived at *St. Peterſburgh* in ſafety, and having engaged a full cargo upon freight, for the voyage from thence to *Hull*, had taken in or received on board nearly the whole thereof, when ſhe was detained by the *Ruſſian* embargo, and the cargo taken out. On the 23d *February* 1801, the Defendants abandoned to the underwriters on the ſhip, all their right and intereſt in the policies on the ſhip; and on the 11th *March* 1801, they abandoned to the Plaintiffs' teſtator, and the other underwriters on the freight, all their right and title to ſuch freight. Theſe abandonments were accepted by the underwriters, and adjuſtments were ſigned on the policies. That upon the ſhip was as follows:—"Adjuſted a total loſs of 100*l. per cent.* "on this policy, and hereby order *Richard Terry* and Son (the "Defendants) to debit our accounts for our reſpective ſubſcriptions "at that rate, which we agree to pay in good bills on *London*, not "exceeding two months' date from the 1ſt day of *April* 1801; "the within-mentioned ſhip having been arreſted and detained in "*Ruſſia*, by order of the *Ruſſian* government; the aſſured hereby "undertaking

A. having effected one policy on ſhip and another on freight, and the ſhip having been detained by embargo in *Ruſſia*, he abandoned the ſhip to the underwriters on ſhip, and the freight to the underwriters on freight, at the ſame time receiving an authority from the underwriters on the ſhip, to act for them, and endeavour to recover it. The ſhip having afterwards brought home the cargo which was on board at the time of the detention, and earned freight accordingly which *A.* received; held, that in an action by the underwriters on freight againſt *A.* they were entitled to recover the freight ſo received by him.

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" undertaking, upon the payment of such loss, to assign over all their " right and interest in this policy to Sir *Christopher Sykes*, Bart. " and *Robert C. Broadley*, Esquire, in such manner as the com- " mittee for adjusting this loss may direct. 23d *February*, 1801." The adjustment upon the freight was as follows:—" Adjusted a " loss of 100*l. per cent.* payable in one month, the assured " agreeing to assign over all their right and title to all future be- " nefit that may accrue hereafter, except as insurers therein. *Lon-* " *don*, 11th *March* 1801, 100*l. per cent.*" On the payment of the bills given by the underwriters, upon the policies on the ship, the Defendants received from the committee of underwriters on the ship, at *Hull*, the following letter or authority: " Messrs. " *Richard Terry* and Son, *Hull*, 9th *June* 1801. On behalf of " the underwriters on the following ships (mentioning several, " and including the *Manchester*), we request you will give orders " to your correspondents at *Riga* and *Petersburgh*, to act for our " interest in the best manner in their power, and in all respects as " they would have acted for your interest, had no change of pro- " perty taken place; you will please also to accept any bills which " may be drawn for the out-fit of the ships, or any other necessary " charges, insuring the amount of the said charges, and we will be " answerable to you for the same. We are, &c." The Defendants acted as agents for the underwriters on the ship, and paid the several sums of money under-mentioned, on account of the said ship, viz.

Expences at *Cronstadt*,	106	16	0
Elsineur,	15	3	7
Hull,	61	4	2½
Primage and Buoyage,	8	16	7½
Portage Bill,	207	12	10½
Travelling expences for crew in *Russia*,	62	10	0
Brokerage bills on *London*,	0	6	0
Insurance on 125*l.* expences,	3	4	9
Dock dues,	17	5	0
	£.482	19	0½

The embargo on the vessels detained in the ports of *Russia* being taken off, the said ship *Manchester* took on board again the same goods, as had been so shipped and unladen at *Petersburgh*, and

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proceeded therewith on her voyage from *Peterſburgh*, arrived in ſafety at *Hull*, and there delivered her cargo agreeably to the bills of lading, which had been ſigned before the embargo, and earned the freight on that voyage. The freight was received by the Defendants, on account of thoſe beneficially intereſted therein, and amounted, after deducting brokerage, to the ſum of 1327*l.* 18*s.* 1*d.* The Defendants made no aſſignment of the freight *(eo nomine)* to the underwriters on the ſhip, nor did they make any aſſignment of the ſhip to the ſaid underwriters, otherwiſe than by the abandonment and the adjuſtment indorſed on the ſeveral policies above-mentioned. The ſhip, after her arrival at *Hull*, and delivery of her cargo, was put up to ſale by the committee of underwriters on the ſhip, and ſold for upwards of 3200*l.*; and thereupon the ſeveral underwriters upon the ſhip, and the Defendants, and the reſt of the part-owners by the direction of the ſaid committee, joined in executing a bill of ſale of the ſame ſhip to the purchaſer, and the ſeveral underwriters upon the ſhip, have received from the nett proceeds of ſuch ſale, 106*l.* 14*s.* *per cent.* on the amount of their reſpective ſubſcriptions thereon. The Defendant, before the preſent action was commenced, received notice from the underwriters on the ſhip, not to pay over the freight to the underwriters on the freight, but to hold the ſame for the underwriters on the ſhip. The queſtion for the opinion of the Court was, Whether the Plaintiffs were entitled to recover?

Bayley, Serjt. for the Plaintiffs. The queſtion in this caſe turns upon the effect of the abandonment to the underwriters on the ſhip. If that abandonment leaves the underwriter upon the ſhip, in the ſame ſituation as the owner would have been, the Plaintiffs are entitled to recover; on the other ſide, however, it muſt be contended that ſuch abandonment places the underwriter upon ſhip in a better ſituation. Had that abandonment never been made, the Plaintiffs would clearly have been entitled to recover from the owners. Upon notice of the detention of the ſhip at *Peterſburgh*, the Plaintiffs who were underwriters on freight, paid as for a total loſs, and took an abandonment; after which the ſhip proceeded on her voyage, and earned her freight; that therefore which was a total loſs at the time, afterwards turned out not to be ſo. The Defendants having received that freight which was the ſubject of inſurance by the Plaintiffs, and of abandonment alſo to them, are

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bound to pay it over. It cannot be ſaid that the freight received by the Defendants, was not the freight inſured by the Plaintiffs, for it was earned upon the ſame goods, by the ſame ſhip and crew, and under the ſame bills of lading. The effect of an abandonment is to put the underwriter, to all intents and purpoſes, in the ſame ſituation as the owner. The underwriters on the ſhip therefore ſtood in the ſituation of purchaſers, with notice of all the obligations to which the ſhip was ſubject; but the abandonment did not inveſt them with any power to put an end to the voyage, which had been contracted for, or the wages of the ſeamen, or any other contract, entered into by the owners of the ſhip reſpecting the ſhip. The effect of the abandonment to the underwriter upon the ſhip, is to give to him the diſpoſal of the body of the ſhip, when the contracts, to which it is ſubject, ſhall have been performed. It is true that as between the aſſured and the underwriter, if the voyage be obſtructed, the former is entitled to conſider ſuch obſtruction as a total loſs, and may abandon; but this right to abandon, cannot interfere with the rights of third perſons; for though by the contract of inſurance, it is as to the immediate parties to that contract a total loſs, yet it is ſo to the immediate parties only, and any other perſons who have not entered into that contract, but have diſtinct rights attaching to the ſhip, cannot be deprived of thoſe rights by the fiction of a total loſs, while the ſhip really continues in exiſtence, and arrives at the end of her voyage. For the Defendants, it muſt be contended, that by the abandonment to the underwriters upon the ſhip, the ſhip became completely veſted in them at *Peterſburgh*; that the voyage being put an end to, they had a right to diſmiſs the mariners without wages, and to diſpoſe of the ſhip as they ſhould think proper; but that having employed the ſhip in bringing home goods from *Peterſburgh*, they had a right to all the benefits ariſing from ſuch a voyage, and were only bound to pay the ſeamen for their ſervices ſubſequent to the abandonment. The injuſtice of conſidering the voyage as completely put an end to by an abandonment is obvious; for if the ſhip, inſtead of being detained at *Peterſburgh*, had been captured in the channel on her homeward voyage and abandoned, and afterwards recaptured, the underwriter would enjoy all the profits of the voyage, paying the ſeamen only for the labour of a few hours.

Beſt, Serjt. for the Defendants. After an abandonment of the ſhip to the underwriters upon the ſhip, they are entitled to every advantage ariſing from the uſe of the ſhip. It has been argued, that the abandonee takes the ſhip, ſubject to all contracts entered into by the owner, with reference to the voyage; but no authority has been cited in ſupport of that doctrine. In caſes of real property indeed, there may be contracts ſo connected with the enjoyment of the property itſelf, as to paſs to the aſſignee; but the contracts entered into by the owner with reſpect to the voyage, are mere perſonal contracts, and the underwriter, after abandonment, takes the ſhip as his own without reference to the perſonal contracts of the owner. The contract of the underwriter is, that he will pay 100*l.* if the ſhip do not arrive at the end of the voyage; the owner contracts with the freighter for the carriage of his goods, and if the owner omit to carry after the expiration of an embargo, he is liable to an action for ſpecial damage. But the underwriter is not liable to the performance of his contract; if he were, inſtead of paying 100*l.*, he might be obliged to pay 300*l.* To aſcertain which ſet of underwriters ought to receive the freight, it is ſufficient to conſider which of the two has earned it. The voyage was at the riſk and expence of the underwriters upon the ſhip, and if the ſhip had been loſt, they alone would have ſuſtained that loſs. Suppoſe the ſhip had been hypothecated in *England*, then if the argument be juſt, that all contracts by the owners of the ſhip reſpecting the ſhip, affect the ſhip under all circumſtances, after the underwriters on the ſhip had brought her home at their expence and riſk, the perſon to whom the ſhip was hypothecated might have claimed her as his own, and the underwriters upon freight, alſo claiming the freight earned under the abandonment to them, the underwriters upon the ſhip would have paid as for a total loſs, would have incurred further expence in bringing home what was abandoned to them, and yet would have been the only perſons reaping nothing from their riſk and expence. It can hardly be contended that all diſadvantages are thrown upon the underwriter of the ſhip, by the abandonment of the ſhip to him, without alſo giving him a right to all the advantages. And if all the advantages are abandoned to the underwriter of the ſhip, the ſubſequent abandonment to the underwriter on freight can make no

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difference; it is a mere nullity. If the freight had never been insured, there is no doubt that the underwriter on the ship might have recovered it from the owner; and as the underwriter on freight claims under the owner, he cannot ſtand in a better condition than him.

Bayley, Serjt. in reply, obſerved, that if the underwriter on freight was entitled to claim the freight, he was alſo liable to his ſhare of expence in bringing the cargo home; and conſequently the arguments ariſing from the hardſhip ſuppoſed to attach on the underwriter upon ſhip, were not well founded.

Cur. adv. vult.

On this day Lord ALVANLEY, Ch. J. ſaid, We have inquired into the circumſtances of the caſe (*a*) lately decided in the King's Bench upon the ſame ſubject, and find they do not materially differ from the preſent. Here the aſſured, in conſideration of being paid for a total loſs upon the ſhip, agreed to aſſign over all their right and intereſt in the policy upon the ſhip; after which they agreed with the underwriters on the freight, in conſideration of being paid a total loſs for the freight, to aſſign over to the underwriter son the freight "all their right and title to all future benefit that might occur thereafter, except as inſurers therein." By this laſt adjuſtment therefore, they agreed to aſſign over all their future intereſt to ariſe on the freight. The ſhip having returned and earned freight, the Defendants, the aſſured, received the whole as if they had never abandoned; and the queſtion now is, Whether, in an action for money had and received, the underwriters on freight are not entitled to demand what the aſſured have received? The Court of King's Bench, in deciding the caſe before them, were of opinion, that the aſſured had bound themſelves to account to the underwriters on the freight, for all the freight they might receive; but in giving judgment they expreſsly declared, that they did not intend to decide the queſtion between the underwriters on the ſhip and the underwriters on the freight. We ſhall take the ſame courſe, and though the caſe has been argued as if it were a queſtion between the two ſets of underwriters, we deſire not to be underſtood as giving an opinion upon ſuch a caſe. We only determine that the Defendants have made themſelves reſponſible to

(*a*) *Thompſon* v. *Rowcroft*, 4 *Eaſt*. 34.

the

the Plaintiffs in this form of action, for the freight which they have received (*a*).

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Per Curiam, Poſtea to the Plaintiffs.

(*a*) At the ſame time it was intimated by the Court, and agreed by the Plaintiffs, that they were to contribute proportionably to the expence of bringing the cargo home.

HOUGHTON and Another, Aſſignees of JACKSON, a Bankrupt v. MATTHEWS and Another.

June 29th.

TROVER for a quantity of indigo.

This cauſe was tried before Mr. Juſtice *Rooke*, at the laſt *Lent* aſſizes at *Lancaſter*, when the following facts appeared in evidence: The Defendants, who were brokers, had, on the 3d of *September*, 1799, ſold a parcel of logwood and fuſtic to *Jackſon*, the bankrupt, and on the 11th of the ſame month, a parcel of indigo, neither of which parcels were paid for at the time of *Jackſon*'s bankruptcy. The logwood and fuſtic was the property of a perſon of the name of *Greatham*, and the indigo of a perſon of the name of *Dixon*; both theſe parcels had been put into the hands of the Defendants by the proprietors, to be ſold by them as brokers, and both ſales were effected in the names of the brokers only, it being their practice to ſell in their own name, where the party for whom they ſold was indebted to them. At the time of ſuch ſales, and when this action was commenced, there was a balance due both from *Greatham* and from *Dixon* to the Defendants (*a*). Soon after the above ſales, *Jackſon*, the bankrupt, put into the hands of the Defendants, the indigo in queſtion, to ſell, as brokers; no advance being made by them upon the indigo, nor any debt exiſting between the Defendants and *Jackſon*, other than what was due to the former for the goods of *Greatham* and *Dixon*, purchaſed by *Jackſon* of the Defendants as before mentioned. Indeed the commiſſion to ſell the indigo in queſtion, was the firſt time the latter had ever employed the Defendants as brokers. While the indigo in queſtion ſtill remained unſold in the hands of the Defendants, as brokers, *Jackſon* became a bankrupt. Upon this the Plaintiffs, as his aſſignees, demanded the indigo, and tendered payment of any charges which might have been

A. a factor, having ſold goods of *B.* in his own name to *C.*, the latter, without paying for theſe goods, ſent another parcel of goods to *A.* to ſell for him, never having employed *A.* as a factor before. *C.* then became bankrupt, and his aſſignees claimed the goods ſent by him to *A.* and which ſtill remained unſold, tendering the charges upon thoſe goods. *A.* refuſed to deliver them up, claiming a lien upon them for the price of the former goods ſold by him to *C.*, there being a balance then due from *B.* to himſelf. Held that the aſſignees were entitled to recover.

(*a*) This fact was only proved by the Defendants' clerk, ſpeaking to his recollection of the ſtate of the account in the Defendants' books.

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been incurrred in reſpect of that article; the Defendants refuſed to deliver it up, claiming a lien upon it for the debt due from the bankrupt, in conſequence of the goods of *Greatham* and *Dixon* ſold to him, and which ſtill remained unpaid for. The learned Judge was of opinion that the Defendants had no lien upon the goods in queſtion, and therefore, under his direction, a verdict was found for the Plaintiffs, with leave reſerved to the Defendants to move to ſet that verdict aſide, and have a non-ſuit entered.

Accordingly a rule *Niſi* having been obtained in laſt *Eaſter* Term,

Lens, Serjt. now ſhewed cauſe. The queſtion is, Whether, becauſe the Defendants, as brokers to two perſons of the names of *Greatham* and *Dixon*, formerly ſold goods to the bankrupt *Jackſon*, for which their principals *Greatham* and *Dixon* have not been paid by the bankrupt, they, the Defendants, have a right to detain the goods in diſpute, which were put into their hands as brokers by the bankrupt, and to pay *Greatham* and *Dixon* out of the proceeds thereof? To entitle the Defendants to this lien which they claim, they muſt either ſhew that the bankrupt is indebted to them perſonally upon a general balance of accounts, or that they have advanced money upon the particular goods which they refuſe to deliver up. It appears, however, that no money was advanced upon the goods, and as this was the firſt inſtance in which the Defendants were employed by the bankrupt as his brokers, there could be no balance in their favour. In fact, *Greatham* and *Dixon* now endeavour to obtain a lien upon the goods through the intervention of the Defendants, and thus to pay themſelves the debt owing to them from the bankrupt. Had the Defendants ſold for *Greatham* and *Dixon* under a *del credere* commiſſion, they would have been perſonally liable to their principals, and therefore might have conſidered the goods as their own, and have claimed all the rights of principals ariſing therefrom. But the Defendants, though they ſold in their own name, ſtill were not reſponſible to their principal for the proceeds of what they ſold, and therefore the parties to whom they ſold, became debtors to the perſons for whom they ſold. The mode in which the Defendants, for their own convenience, made out their ſale accounts, cannot inveſt them with any rights which do not reſult from the nature of the tranſaction itſelf. The

eſtate of the bankrupt will remain indebted to *Greatham* and *Dixon*, but there is no liability under which the Defendants can be called upon to pay that debt. In *Grove* v. *Dubois*, 1 *T. R.* 112, it was held that a broker, with a *del credere* commiſſion, might ſet-off to the ſame extent as a principal; but there the Court expreſsly take the diſtinction of his being a broker acting under a *del credere* commiſſion. The ſame principle was recogniſed in *George* v. *Clagett*, 7 *T. R.* 359; and indeed there the deciſion of the Court was not in favour of the broker, for it only gave a purchaſer under him as ſuch broker a ſet-off againſt his principal.

Heywood, Serjt. *contrà*. It is ſuppoſed, for the ſake of the argument, that a broker ſelling for a third perſon has no more property in the goods than a mere ſtranger, whereas by the depoſit of the goods in his hands he acquires a ſpecial property in them. Now in *Kruger* v. *Wilcox*, *Ambl.* 253, Lord *Hardwicke* ſays, in caſes of bankruptcy, "if any perſon has a ſpecific lien or a ſpecific property in goods, which is clear and plain, it ſhall be reſerved to him notwithſtanding the bankruptcy." The goods ſold to the bankrupt were not ſold as the goods of *Greatham* and *Dixon*, but in the name of the Defendants; that circumſtance was of itſelf ſufficient notice to the bankrupt, that the Defendants meant to claim a lien upon the goods ſubſequently put into their hands by him. The caſe of *Gonſalez* v. *Sladen*, *Bull. N. P.* 130. 2d. edit. clearly proves that the broker may maintain an action in his own name againſt the vendee of the goods. It is contended indeed, that none but brokers acting under a *del credere* commiſſion can claim this lien which the Defendants inſiſt upon; but it ſhould be remembered, that the very ground upon which lien is allowed is to protect the broker from loſs; and that a broker who advances money to his employers upon the confidence reſulting from his rights as a broker, has at leaſt as good a claim to a lien as he who acting under a *del credere* commiſſion, only makes himſelf liable to his principal for any poſſible loſſes which may occur. Now in this caſe the Defendants had advanced money to *Greatham* and *Dixon*, for both theſe perſons were indebted to them on the balance of accounts, both at the time of the ſale and the detainer of the goods in queſtion, though it is true that they did not ſpecifically advance money in reſpect of the goods ſold by them to the bankrupt. In *Atkins* and another v. *Amber*, 2 *Eſp. N. P. Caſ.* p. 493, it was holden that brokers not ſelling

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under a *del credere* commiſſion might maintain an action againſt the vendee for the price of the goods ſold, the principal being at that time in their debt for money advanced upon thoſe goods; and Lord Ch. J. *Eyre* was of opinion, that it was no objection to the recovery by the brokers, that the declaration ſtated the contract to have been made with them, whereas the ſale-note ſtated that the goods were ſold on account of the principal. And in *Drinkwater* v. *Goodwin*, *Cowp.* 251, Lord *Mansfield* ſays, "We think a factor who receives clothes, and is authoriſed to ſell them in his own name, but makes the buyer debtor to himſelf, though he is not anſwerable for the debts, yet he has a right to receive the money. His receipt is a diſcharge to the buyer, and he has a right to bring an action againſt him to compel the payment."

Cur. adv. vult.

There being a difference of opinion upon the Bench, the learned Judges now delivered their opinions *ſeriatim*.

CHAMBRE, J. The queſtion is, Whether when a broker receives goods to ſell for *A.* he is entitled to retain them though unſold, after a tender of all charges due in reſpect of thoſe goods, on the ground of a lien for the price of other goods ſold by him for *B.* to *A.* under a general authority from *B.* to ſell, there being no general balance due from *A.* to the broker, and the broker not having ſold the goods of *B.* under a *del credere* commiſſion? I ſtate the queſtion thus, becauſe I conceive that, in the preſent caſe, the mere act of the bankrupt buying goods of the Defendant did not conſtitute the relation of principal and factor between them. The demand of the Defendant upon the firſt goods did not ariſe out of any courſe of dealing in the relation of principal and factor, but was as foreign to that relation as if it had ariſen upon a legacy, or any other ſpecies of debt the moſt remote from that courſe of dealing. I do not find any authority for ſaying, that a factor has any general lien in reſpect of debts which ariſe prior to the time at which his character of factor commences: and if a right to ſuch a lien is not eſtabliſhed by expreſs authority, it does not appear to me to fall within the general principle upon which the liens of factors have been allowed. It ſeems to me that the liens of factors have been allowed for the convenience of trade, and with a view to encourage factors to advance money upon goods in their poſſeſſion, or which muſt come to their hands as factors; but debts which are incurred

red prior to the exiſtence of the relation of principal and factor, are not contracted upon this principle. And if the lien now contended for were allowed, inſtead of inducing perſons to place goods in the hands of factors, it would operate the contrary way, ſince it would tend to prevent inſolvent perſons from employing their creditors as factors, leſt the goods entruſted to them ſhould be retained in ſatisfaction of former debts. If this were the only point in this caſe, I ſhould be of opinion that the Defendants were not entitled to retain: But laying this point out of the queſtion, I ſtill think the debts due from the bankrupt, in reſpect of the goods ſold to him, are not to be conſidered as due to the Defendants, ſo as to authorize them to ſet-off ſuch debts, in an action brought againſt them by the bankrupt's aſſignees, and that the Defendants have no property or intereſt whatever in thoſe debts. I never yet heard of a perſon being allowed to protect himſelf, by ſetting up debts in reality due to other perſons; or that a factor, having no demand on his principal, could, by tranſactions with a third perſon, create a new intereſt in himſelf. In the caſe of *Drinkwater* v. *Goldwin*, Lord *Mansfield* ſays, "it ſhall not be in the power of any man, by his election, to vary the rights of two other contending parties." According to this rule, the factor has no right to prejudice the title of his principal. That a factor has a lien for his general balance, is a point too well eſtabliſhed to be diſputed. The caſe *Kruger* v. *Wilcox* proves nothing more. Where a factor is in advance for goods by actual payment, or where he ſells under a *del credere* commiſſion, whereby he becomes reſponſible for the price, there is as little doubt that he has a lien on the price, though he has parted with the poſſeſſion of the goods. If he acts under a *del credere* commiſſion, he is to be conſidered as between himſelf and the vendee, as the ſole owner of the goods. There is no doubt of the authority of a factor to ſell upon credit, though not particularly authoriſed by the terms of his commiſſion ſo to do; but if he ſo ſell without a *del credere* commiſſion, it is well eſtabliſhed that he does not become a ſurety; the debt is due to the owner of the goods only. Many caſes have been cited, which do not appear to me to warrant the inferences drawn from them. In *Conſtable* v. *Sladen* it is ſaid, that if the factor of a perſon beyond ſea buy or ſell goods, he may ſue or be ſued in his own name; for if he buy, the credit is preſumed to be given to him; and if he ſell, the promiſe

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miſe is preſumed to be made to him. But where the principal reſides abroad, he is preſumed to be ignorant of the circumſtances of the party with whom his factor deals, and therefore the whole credit is conſidered as ſubſiſting between the contracting parties. The ſentence in *Buller*'s *niſi prius*, immediately following the caſe of *Gonſalez* v. *Sladen*, was not cited. There it is ſaid, that "a factor's ſale does, by the general rule of law, create a contract between the owner and buyer; and therefore if a factor ſell for payment at a future day, if the owner give notice to the buyer to pay him, and not the factor, the buyer would not be juſtified in afterwards paying the factor." The factor therefore has no right to conſider himſelf as ſubſtantially the creditor of the vendee of the goods; he has no equity in his favour, and the account is really and truly between the vendee and the principal. It is true that Mr. J. *Buller* adds, "yet perhaps, under ſome particular circumſtances, this rule may not take place, as where the factor ſells the goods at his own riſk (*i. e.* is anſwerable to the owner for the price, though it be never paid), for in ſuch caſe he is the debtor to the owner, and not the buyer." Neither the caſe of *Rabone* v. *Williams*, nor that of *George* v. *Clagett*, appear to me to have any application to the preſent. The principle upon which thoſe caſes proceeded, is well ſummed up in *Cullen*'s bankrupt laws (*a*), *viz.* that where a party being only an agent, acts oſtenſibly as the real and ſole owner, (as in the caſe of a factor concealing his principal, or an acting partner his partners), the buyer of goods from him may, in an action by the principal in the one caſe, or the firm in the other, ſet-off a debt due to him from the factor or acting partner reſpectively, upon the ground that the parties by their conduct, having enabled their agent to gain credit as the ſole owner, and the buyer having *bonâ fide* contracted with him in that character, they cannot recover againſt the buyer, without allowing him the ſame advantages and equities in his defence that he would have had againſt their agent. There is a caſe of *Garrett* v. *Cullum*, *Bull. N. P.* p. 42. laſt *Ed.* and which is alſo cited in *Scott* v. *Surman*, *Willes*, 405. which fully proves the doctrine that the debt of the vendee is not due to the factor. In that caſe the factor of a perſon living in *Ireland*, having ſold goods to a perſon living in *London*, without acquainting him with the name of his principal, or acquainting his principal with the name of his vendee, became bank-

(a) P. 206. *n.* 71.

rupt;

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rupt; after which the vendee paid the money to his aſſignees; the principal then brought an action againſt the aſſignees and recovered, it being held that though the vendee was diſcharged by the payment to the aſſignees, yet the debt was not in law due to them but to the principal, and therefore did not paſs under the aſſignment. That caſe is ſaid in *Willes*, to have been cited at *Guildhall*, by Lord Ch. J. *Parker*, with approbation. Theſe caſes appear to me to eſtabliſh, that where a factor has no ſpecial claim on the goods, and he has diſpoſed of them, whereby he has loſt the advantage ariſing from poſſeſſion, the debt is to be conſidered to all intents as the debt of the principal, and the factor has no lien on the price. My brother *Heywood* mainly relied upon the caſe of *Drinkwater* v. *Goodwin*, whereas the Court throughout that caſe evidently proceed on the ground of the factor having given his ſecurity for the payment of the goods, and thereby acquired a lien on them in the ſame way as if he had advanced his money on the goods themſelves. The principle upon which that caſe was decided is very correct; but why did the deciſion proceed upon that principle, unleſs with a view to diſtinguiſh it from caſes circumſtanced like that now before the Court? It is unneceſſary to enter at large into all the poſitions on this ſubject, which are laid down in the books; many of which are very clearly ſtated in *Scott* v. *Surman*. It has been obſerved, that though a broker does not act under a *del credere* commiſſion, ſtill he may bring an action in his own name for goods ſold by him. This power, however, is incident to the nature of his employment, as alſo that he ſhould be able to give diſcharges to thoſe from whom he receives money in payment of goods ſold on account of the perſons for whom he acts. But theſe circumſtances do not prove that he has any intereſt in the goods which paſs through his hands. How would this caſe have ſtood, if the Defendants had never become creditors of *Greatham* and *Dixon*? It has not been argued, that in ſuch caſe there could have been any lien; and yet how can any right between the Defendants and the bankrupt be altered by a ſubſequent courſe of dealing between the Defendants and third perſons? The rights of lien and detention muſt have exiſted at the time when the goods of *Greatham* and *Dixon* were ſold to the bankrupt, and cannot be varied by the ſubſequent conduct of *Greatham* and *Dixon* towards the Defendants, unleſs the bankrupt has been privy to their tranſac-

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tions. Under all these circumstances, and finding no authority which warrants the factor in claiming any such lien as is claimed in this case, I must deliver my opinion that the Defendants have failed in the defence set up by them, and that as they were fully satisfied all they had a right to demand, the learned Judge was perfectly correct in his direction to the jury.

ROOKE, J. This question arises in an action of trover, and must be decided by the rules of law. Cases which have been decided by the Lord Chancellor, on the principles of general equity at the hearing of bankrupts' petitions, must not give the rules for our decision in the courts of law. Lord *Hardwicke* very cautiously takes the distinction in two cases, namely, *Kruger* v. *Wilcox*, *Ambl.* 253. and *Ex parte Deeze*, 1 *Atk.* 228. In the first of these cases he says, "whether this was ever allowed in trover at law, where the goods were turned into money, I cannot say, nor can I find any such case. I have no doubt it would be so in this Court if the goods remained in specie, nor do I doubt of its being so where they are turned into money." In the latter case he says, "and here, though there had been no bankruptcy in an action for these goods, the debt could not have been set-off; yet as the clause of mutual credit has been extended, I think it may come within that rule." In the case before the Court, there is no doubt that the Defendants had a lien on the goods sent to them by *Dixon* and by *Greatham*, for their general balance while the goods remained in their hands, and if they had received the money for these goods, they might have retained it for the balance due to them. But when they parted with the goods they parted with their lien; and if they were at that time creditors of *Dixon* and of *Greatham*, (which was not directly proved at the trial) they were on the same footing as the other creditors. Having then a claim on the general effects of *Dixon* and *Greatham*, *Jackson*, to whom they had sold some of their goods, sends them goods to sell, and while these goods remained unsold, becomes bankrupt; the Defendants claim to retain these goods for a debt due to *Dixon* and to *Greatham*; because if *Jackson*, instead of sending goods to them as factors, to sell for him on his own account, had sent them money to pay for the goods he bought of them, they might have retained the money for debts due to them from the house of *Dixon* or of *Greatham*. The

doctrine

doctrine of liens has already been carried very far, but I cannot find that it has yet been carried so far as to permit a factor to retain for all possible demands which he may choose to make on the goods sent to him. Here the Defendants are supposed to have a demand and a right of action against *Dixon* and against *Greatham*, who, for aught we know, are each of them solvent. The Defendants are not answerable to them for the value of the goods sold to the bankrupt, nor have they advanced any money on them. The bankrupt is indebted to the house of *Dixon* and of *Greatham*, for the price of the goods sold to him on their account by the Defendants. The Defendants then are middle men, not answerable to *Dixon* or to *Greatham*, and have no claim upon the bankrupt in their own right except for the expences due on the goods he has sent to them, which expences have been tendered to them. I doubt (but with great deference to my L. Ch. Justice who has had so much experience in Courts of Equity) how far equity would assist such a claim, since it is not necessary to secure the factors themselves, but is set up only for the benefit of other persons. I question whether the creditors at large of the bankrupt *Jackson*, have not an equitable as well as legal claim, equally well founded with that of *Dixon* and of *Greatham*. This is an attempt, through the means of these Defendants, to give the houses of *Dixon* and of *Greatham* a preference above the other creditors. The assignees have made out their case as Plaintiffs; the Defendants set up this lien by way of defence: it is incumbent on them to make out a clear case; they are not entitled to have presumptions made in their favour; and the Court can only judge from the facts actually proved by them. On the whole I am satisfied that at law, and in this action of trover the Defendants cannot support this claim of a lien. My opinion therefore is, that the rule for a new trial should be discharged.

HEATH, J. I am of the same opinion with my brothers *Rooke* and *Chambre*, who have so fully discussed the principles and authorities relating to the subject that it is unnecessary for me to enter into the matter at length. The Defendants claim a right to retain the goods in question as brokers, not in respect of any debt due to themselves upon the goods, but in respect of a debt which they say is due from the bankrupt to them, but which, in truth, is due to *Greatham* and to *Dixon*. That part of the case has been very satis-

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factorily argued by my two brothers who preceded me. There are two ſpecies of liens known to the law, namely particular liens and general liens. Particular liens are where perſons claim a right to retain goods in reſpect of labour or money expended upon them; and thoſe liens are favoured in law. General liens are claimed in reſpect of a general balance of account; and theſe are founded in cuſtom only, and are therefore to be taken ſtrictly. There is no authority to ſhew that ſuch cuſtom has ever been extended to debts generally; and the opinion of Lord *Hardwicke* in *Ex parte Deeze*, which is one of the firſt caſes in which a party was allowed to retain for a general balance, ſeems directly to the contrary. From the report of that caſe in 1 *Atk.* 229, it appears as if the deciſion had been founded on the 2 *Geo.* 2. reſpecting mutual credits; but that report is not correct; for in *Ex parte Ockenden*, 1 *Atk.* 237, Lord *Hardwicke*, ſpeaking of the caſe *Ex parte Deeze*, ſays "there was evidence that it was uſual for packers to lend money to clothiers, and the clothes to be a pledge not only for the work done in packing, but for the loan of money likewiſe." In that caſe, therefore, a right was claimed to retain for a general balance of accounts, *Deeze* having been a creditor of the bankrupt for money advanced to him as a packer and merchant, antecedent to the time of the particular goods being put into his hands. From the expreſſion of Lord *Hardwicke* alſo, 1 *Atk.* 229, theſe goods were in the petitioner's hands as a pledge for ſome part of his debt, namely, the price of the packing; "and what right has a Court of Equity to ſay, that if he has another debt due to him from the ſame perſon, the goods ſhall be taken from him without having the whole paid?" we may collect that he did not think the petitioner entitled to retain for the whole, independent of the cuſtom. The caſe of *Drinkwater v. Goodwin*, proceeded on a ſpecial agreement independent of the cuſtom. The agreement was ſtated and relied on; and Lord *Mansfield* ſays, "the agreement therefore is, that he ſhall have a lien." There is no authority therefore for the poſition, that a factor may retain goods in his hands in reſpect of all debts whatſoever; and there is a rule of law which has not been touched upon in argument, and which appears to me deciſive of the contrary, namely, that nothing can fall within the cuſtom of trade but what concerns trade. Collateral obligations therefore, ſuch as

money due for rent, are not within the cuſtom which authoriſes a factor to retain for a general balance.

Lord ALVANLEY, Ch. J. When this motion was firſt made, I inclined to think my brother *Rooke*'s direction proper; but having heard the argument and looked further into the queſtion, I find myſelf under the neceſſity of differing from my brothers ſo far, as to think that a verdict ought not to be entered for the Plaintiff on the facts ſtated in the report. Farther than that however I do not go. I am by no means prepared to ſay, that a verdict ought to be entered for the Defendant; for I think that if a new trial were granted, ſome facts might be eſtabliſhed which are now equivocal, and which would give riſe to a queſtion of ſo much importance, that I ſhould wiſh to take more time for conſideration before I decided againſt the Defendants' right to a lien. It was not diſtinctly proved at the trial, that *Greatham* and *Dixon* were indebted to the Defendants, but we muſt ſuppoſe that fact capable of proof. If, however, the fact itſelf would make no difference in the determination of the Court, there is no reaſon for ſending the caſe to a new trial in order to have it found. At preſent, therefore, I muſt ſuppoſe that the caſe affords ſufficient ground to infer that *Greatham* and *Dixon* were indebted to the Defendants. Theſe perſons then having put goods into the hands of the Defendants, with authority to ſell them in their own names, and conſequently to bring actions and give receipts for the money; and the Defendants having accordingly executed their commiſſion by ſelling in their own names, and *Greatham* and *Dixon* being ſtill in their debt, the Defendants acquired a right to demand the value of the goods from the perſons to whom they were ſold. The caſes cited have, I think, deciſively proved that point. Nor does it make any difference, whether the goods were ſold under a *del credere* commiſſion or not. The only effect of a *del credere* commiſſion, is to make the factor reſponſible for the value of the goods to his principal. If the factor, without ſuch a commiſſion, ſell the goods in his own name, he may bring an action for the value; and if the principal bring the action, the vendee may ſet-off a debt due to him from the factor. The factor, therefore, being authoriſed to bring an action for the value of the goods, may retain the whole amount in ſatisfaction of the debt due to him from his principal. We are to conſider then, in the firſt place, what relation was created between

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theſe parties, by thoſe circumſtances which took place ſubſequent to the ſale of the goods belonging to *Greatham* and *Dixon*; remembering that at the time of that ſale, the Defendants were the factors of *Greatham* and *Dixon* only, and not of the bankrupt. That ſubſequent to that period, and while the bankrupt ſtill remained indebted for the goods of *Greatham* and *Dixon*, which he had received from the Defendants, he ſends the goods in queſtion to the Defendants to be ſold by them as his brokers, knowing that he ſtood indebted to them for the goods of *Greatham* and *Dixon*, though he did not know but that the Defendants themſelves were the proprietors of the goods, the names of *Greatham* and *Dixon* not having been communicated to him. Conſequently the bankrupt muſt have conſidered his debt as due to the Defendants; and the moment he ſent goods to them as brokers, their right of lien attached upon the goods. If the Defendants had ſold the goods, it is clear that they might have applied the money ariſing out of the ſale in diſcharge of the debt due from the bankrupt, on account of the goods of *Greatham* and *Dixon*; and how do we know that they did not forbear to ſell, becauſe they conſidered the goods as a ſecurity for that debt? Whatever may be the caſe with reſpect to other trades, it is not now denied that a factor has a right to retain for the general balance of his account. If a debt be due from the principal to the factor, antecedent to the time of the particular goods being put into the hands of the latter, he is entitled to retain them as a ſecurity. And if a man commence dealing with a factor, to whom he is indebted on bond, I am not prepared to ſay that the lien of the factor would not attach upon ſuch debt. In the preſent caſe, however, the goods of *Greatham* and *Dixon* were ſold by the Defendants as factors, and the debt therefore aroſe in the ordinary courſe of their dealing as factors. The caſe of *Drinkwater* v. *Goodwin* was, I admit, the caſe of a particular contract, but the principle of the deciſion was, that if a factor become ſurety for his principal, he has a lien to the amount of the ſum for which he becomes ſurety. The caſe of *Grove* v. *Dubois* eſtabliſhes, that a broker acting under a *del credere* commiſſion, may ſet-off againſt his principal the amount of loſſes incurred; and the caſes of *George* v. *Clagett*, and *Rabone* v. *Williams* ſhew, that if a factor ſell the goods of his principal in his own name, the buyer may ſet-off againſt the principal a debt due from the factor. It appears to me, therefore, that a factor who ſells in his own name, ſtands in the ſame

ſituation with reſpect to lien as if he had a *del credere* commiſſion. I do not wiſh to be bound by my preſent opinion, but as the caſe ſtrikes me, the preſent Defendants are warranted, by the cuſtom of merchants, in claiming a lien upon the goods now ſued for. It is contended, that the Defendants only ſet up this lien with a view to protect *Greatham* and *Dixon*. But I cannot aſſent to a propoſition which aſſumes that *Greatham* and *Dixon* are ſolvent. The preſumption rather is that they are inſolvent, ſince they have not paid the debt due from them to the Defendants; and the queſtion is, Whether the latter are not juſtified in retaining the goods in their hands, as a ſecurity againſt the inſolvency of their debtors? With reſpect to the authority of the caſes which have been cited from the Court of Chancery, it is true that courts of equity, in adminiſtering juſtice, ſometimes go further than the courts of law. But it is clear that the Lord Chancellor has no authority to ſkreen goods in the hands of a factor, with a view to diſtribute them in equity according to a different courſe from that which prevails at law; and if Lord *Hardwicke* had entertained any doubts upon the rule of law, he would certainly have taken the opinion of ſome common-law court. I can hardly conceive the caſe *Ex parte Deeze* to be well reported: for, according to the report, Lord *Hardwicke* ſeems to ſuppoſe that in caſes of bankruptcy, if a perſon has a lien to a certain amount, there is no harm in giving him a lien to the whole amount of his claim. But to ſuch a propoſition no lawyer can aſſent. The other ground of determination ſuppoſed to have been ſtated by his Lordſhip, namely, the clauſe of mutual credit, certainly cannot be ſuſtained. The deciſion therefore muſt reſt upon the ground of lien; and in the ſubſequent caſe *Ex parte Ockenden*, Lord *Hardwicke* ſtates the real principle upon which the caſe *Ex parte Deeze* muſt have proceeded; for he ſays "in the caſe *Ex parte Deeze*, there was evidence that it was "uſual for packers to retain not only for work done, but for money "lent." Theſe caſes were followed by ſome other determinations in equity, which I do not think it neceſſary to mention, as there are caſes at law. In *Green* v. *Farmer*, 1 *Black.* 652. 4 *Bur.* 2221, Lord *Mansfield* ſays, "the convenience of commerce and natural "juſtice are on the ſide of liens, and therefore of late years Courts "lean that way." He then ſtates, that lien may ariſe not only from expreſs contract, or where the party has acted as a factor,

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but that it may be implied from the uſage of trade, or from the manner of dealing between the parties in the particular caſe. Indeed he conſiders Lord *Hardwicke* as having decided the caſe *Ex parte Ockenden* (which at firſt view ſeems not ſo favourable to liens as his opinion in *Ex parte Deeze*) on the ſpecial ground that there was no room to imply a lien, from the uſage of trade or the particular manner of dealing. The caſe of *Kruger* v. *Wilcox* had before eſtabliſhed, that if there be a courſe of dealings and general account between a merchant and a factor, and a balance is due to the factor, he may retain the ſhip and goods, or produce, for ſuch balance of the general account; it is conſidered as an intereſt in the ſpecific things, and they are made articles in the general account. In that caſe Lord *Hardwicke* ſpeaks only of a foreign factor, but there is no doubt that a home factor is entitled to the ſame lien, though the *lex mercatoria* ſeems to found the origin of the cuſtom on the merchant reſiding abroad. *Kruger* v. *Wilcox* is recogniſed in *Foxcroft* v. *Devonſhire*, 2 *Bur.* 937, and in *Walker* v. *Birch*, 6 *T. R.* 262. Lord *Kenyon* conſiders the factor's right to his lien for a general balance as ſo long ſettled, that it ought not to be brought into diſpute; he ſays it is an agreement which the law implies. The opinion indeed of Mr. Juſtice *Lawrence* in that caſe, may ſeem to ſupport the opinion of my brothers; for he ſays, that the doctrine of lien only applies to caſes where the goods have been depoſited in the nature of a pledge; that the perſons for whom the lien was then claimed, never acted as the brokers of their principal before the tranſaction in queſtion, and conſequently that the goods could not be conſidered as depoſited with the former as a general pledge. The queſtion, however, is, Whether a factor be not that ſort of perſon that all goods which come into his hands are to be conſidered as cloathed with a lien for his general balance? In *Co. Bank. Law.* p. 455, *Ed.* 1797, it is laid down, that where one has acted as factor for another, every thing in his hands is conſtrued to be a pledge not only for incidental charges, but as an item of mutual account for the general balance due to him. The only point in difference between my brothers and myſelf is, Whether this debt due on account of the goods ſold for *Greatham* and *Dixon*, be ſuch a debt as can be brought into a mutual account between the Defendants and the bankrupt? I am not deſirous of favouring liens to ſo great an extent as has been done by the Courts of late; for we know it has been determined, that the members of

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any trade may, by agreement among themſelves, obtain the benefit of that ſort of lien to which a factor is entitled by the general law. I am ſorry the Courts have gone ſo far. In this caſe, however, I feel that the Defendants are in poſſeſſion of a principle of law which has never been denied, and that being commiſſioned by another to ſell goods for him, they acquired a right to retain thoſe goods in ſatisfaction of any demands which might be due to them from the perſon who ſent the goods. The moment the goods were ſent, the relation of principal and factor aroſe; and when that relation commenced, the right to a general lien attached. I deſire not to be conſidered as giving a poſitive opinion, but my doubts incline me to think that the Court is juſtified in entering a verdict for the Plaintiffs.

Rule diſcharged.

(IN THE HOUSE OF LORDS.)

LOTHIAN and Others *v.* HENDERSON, RIDDELL and Others. July 14th.

Policy of inſurance on board the *Catherine*, an *American* veſſel. After the policy was effected, doubts having ariſen whether the policy contained a warranty, the underwriters ſigned an agreement, that in caſe of capture or ſeizure, the aſſured, before they claimed for a loſs, muſt produce proofs of the ſhip being *American* bottom, and by bills of lading ſhew that the cargo had been ſhipped on account and riſk of *A. B*, upon which they would ſettle by granting bills at four months for the amount of their ſubſcriptions; in full dependence that the inſured would uſe their beſt endeavours to recover the property as for account of the ſhippers. Held that on proof being produced that the ſhip was *American* bottom, and the cargo ſhewn by bills of lading to have been ſhipped on account and riſk of *A B*, the aſſured were entitled to recover on a loſs by capture, notwithſtanding the production by the underwriters of any *French* ſentence of condemnation to ſatisfy the warranty.

A ſentence of condemnation in a *French* Court of Admiralty is admiſſible evidence in an action here between the aſſured and underwriters of a policy of inſurance containing a warranty of neutrality.

It ſeems that the ſentence of a foreign Court of Admiralty condemning a ſhip warranted neutral, in which the conſideration leading to the judgment proceeded on the want of a document not required by the law of nations, but which adjudges "lawful prize all the goods and effects which compoſe the cargo of the ſaid ſhip, ſince the whole, owing to the Captain not being provided with proper and regular diſpatches and papers, is to be deemed the property of the enemies of the *French* Republic," is concluſive evidence againſt the warranty of neutrality.

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they meant no more than to deſcribe the veſſel as they found it in the inſtructions of their correſpondents; and that the meaning of this part of the policy and the underſtanding of the parties might be aſcertained with preciſion, an agreement in the following terms was propoſed by the brokers, and ſigned by all the underwriters:

"*Glaſgow*, 20th of *April* 1797.

"Whereas doubts have ariſen how far, by the inſurances underwritten by us on tobacco for Meſſrs. *Henderſon*, *Ferguſon*, and *Gibſon*, by the *Catherine*, there is a warranty of property, and what is to be underſtood by ſuch a warranty; it is hereby declared, that in caſe of capture or ſeizure, Meſſrs. *Henderſon*, and Co., before they claim for a loſs, muſt produce proofs of ſhip being an *American* bottom, and by bills of lading ſhew that the tobacco ſhall have been ſhipped on account and riſk of Meſſrs. *Henderſon*, *Ferguſon*, and *Gibſon*: upon which we ſhall ſettle by granting our bills at four months' date for the amount of our ſubſcriptions, deducting the ſtipulated premium, in full dependence that the inſured will uſe their beſt endeavour to recover the property as for account of the ſhippers."

The *Catherine* ſailed on the 1ſt of *April* from *Nottingham* in *Virginia*, and on the 17th of *May* was captured by the *Dugué Trouin*, a *French* privateer, commanded by captain *Dutache*, becauſe ſhe had not on board a *rolle d'equipage*, required by the *French* Executive Directory, and ſent into *France*. After a trial in the Tribunal of Commerce in the canton of *Nantz*, the *Catherine* was condemned. Of this the Reſpondents were informed on the 22d of *Auguſt*, by a letter and proteſt of the ſhip's maſter, captain *Caxneau*. Being thus certified of the capture, the Reſpondents tranſmitted the captain's proteſt to their brokers, directing them to lay it before the underwriters, and requeſt them to ſettle the loſs according to agreement. They tranſmitted at the ſame time, according to their undertaking, the bill of lading of the *Catherine*, which expreſſed that the cargo was ſhipped on account and riſk of *Henderſon*, *Ferguſon*, and *Gibſon*, citizens of the United States, and a certificate by the *American* vice-conſul at *Nantz*, ſtating that the ſhip's papers were lodged in the Tribunal of Commerce of that city. Theſe papers were the only papers which, at the time when the *Catherine* ſailed, were furniſhed or could be furniſhed to *American* ſhips; which circumſtances the Reſpondents

offered to prove to the Appellants, the underwriters. The Appellants, however, refuſing to pay the loſs, the Reſpondents brought an action in the Court of Admiralty in *Scotland*. To this action the Appellants ſet up the following defence: That the *Catherine* being called in the policy an *American* veſſel, implied a warranty undertaken by the aſſured of that fact; that this warranty further implied that the ſhip ſhould be furniſhed with all documents neceſſary to prove the neutrality; and that the ſentence of the *French* prize court, condemning ſhip and cargo as enemy's property, was evidence concluſive and not to be redargued, that the warranty had not been complied with, and therefore that the aſſurers were liberated. The material part of the *French* ſentence was as follows: "The Tribunal having maturely weighed the whole matter, without attending to the certificate of property of the ſhip *Catherine*, bearing date 15th *June* 1791, and a peculiar paſſport of the 26th *March* 1797, ſigned "*Waſhington*," nor to the charter-party of the firſt of *May* the ſame year, which proves the ſaid ſhip *Catherine* to be the property of Citizen *Anthony Davenport* of *Newbury*, citizen of the United States; without attending farther to a manifeſt, bearing date the 2d of *March* 1797, to which is annexed a certificate of the 26th *March* of the ſame year, ſigned by *George Riſci*, tax-receiver in the diſtrict of *Nottingham* in the State of *Maryland*, ſtating that the aforeſaid ſhip has been expedited according to law; nor to a bill of lading, dated the 22d of *March* 1797, which proves that the ſhippers and owners of the 270 hogſheads of tobacco laden on board the *Catherine*, are *Henderſon*, *Fergufon*, and *Gibſon*, of *Dumfries* in *Virginia*, citizens of the United States; and that the ſaid tobacco was expedited for their account and riſk, to the conſignment of *Thomas Hoedt*, reſiding at *Rotterdam*; conſidering that Captain *Samuel Cazneau* has not produced any muſter-roll in due form, ſigned and atteſted by public officers appointed for that purpoſe, but merely a ſort of ſhip's articles without any ſignature or date, wherein are inſerted the names of ten men, ſaid to compoſe the crew of the ſhip *Catherine*, without mention being made either of their native place or of their place of abode; and in corroboration of this liſt, ſix protections, granted by the United States to perſons named *John Cannon*, &c. being part of the ſhip's crew, and which proves them to be citizens of the United States of *America*, and their having been ſo for a certain

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certain number of years; conſidering that the 7th article of the law of 13 *Nivoſe*, 3d year, which abrogated that of the 9th *May* 1793, cannot be recurred to, purſuant to the *arrêt* or reſolution of the Executive Directory of the 12th *Ventoſe* 5th year, and that this law remains in full vigour; conſidering that this law of the 9th *May* 1793, old ſtyle, orders the ordinances and regulations of 1704, 1744, and 1778, relative to the manner of proving at ſea the property of neutral ſhips and merchandiſe, to be carried into effect; conſidering that the 1ſt article of the law of 3d *Brumaire*, 4th year, ordains as follows: "When a declaration of war againſt a nation ſhall cauſe maritime armaments to take place, the Executive Directory will draw up inſtructions, clear and preciſe, the form of which ſhall not leave the leaſt doubt to the ſearching veſſels with reſpect to their duty and rights;" conſidering that the arrêt of the Executive Directory of the 12th *Ventoſe*, 5th year, in the 4th article, in terms clear and imperative, declares lawful prize all the ſhips of the United States unprovided with muſter-rolls, and orders them to be treated as enemies; conſidering, laſtly, that if any ſhip be declared a lawful prize, and treated as enemy, the confiſcation of her cargo is a matter of courſe; the Tribunal, in conformity with the laws above quoted, and eſpecially with the article of the arrêt of the Executive Directory of the 12th *Ventoſe*, 5th year, decrees and declares lawful prize the ſhip *Catherine*, *Samuel Cazneau* maſter, captured by the private ſhip of war *Duguè Trouin*, commanded by captain *Dutache*, together with her apparel and furniture. Decrees and declares further lawful prize all the goods and effects which compoſe the cargo of the ſaid ſhip, ſince the whole, owing to captain *Samuel Cazneau* not being provided with proper and regular diſpatches and papers, is to be deemed the property of the enemies of the French Republic."

The above ſentence having been appealed from to the Civil Tribunal of the department of the *Lower Loire*, was confirmed in the following terms: "Conſidering that the maritime regulations of 1704, 1744, and 1778, anterior and poſterior to the treaty concluded between *France* and *America*, imperiouſly require that all foreign ſhips ſailing in time of war ſhould have on board a *rolle d'equipage*, or muſter-roll, authenticated by the public officers of the port from which they ſail, under pain of being conſidered as good prizes; conſidering that the model of the paſſport annexed to the treaty of 1778 requires every *Anglo-American*

captain who has obtained it, to deliver a list, signed and certified by witneſſes, of the names, ſurnames, places of birth and abode of the people who compoſe his crew, and that *Samuel Cazneau* had but an informal and unſigned liſt, decrees by judgment in the laſt reſort, that it has been rightly determined by the ſentence from which he appeals; orders that that judgment ſhall obtain its full and entire effect; condemns the Appellant in coſts."

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The Reſpondents anſwered, firſt, that there was no warranty expreſſed or implied in the policy; 2dly, ſuppoſing the deſcription of the ſhip as an *American* to imply a warranty, it could not be carried farther than that ſhe was in fact *American*, and was furniſhed with all the documents uſual and required by the law of nations, and by the treaties ſubſiſting between *America* and the powers at war to prove the fact, and that evidence had been given that ſhe had all ſuch documents; 3dly, that the ſentences of the *French* court were not concluſive evidence of the ſuppoſed warranty not having been complied with, for that without entering into the queſtion whether ſentences of foreign courts, if broadly and clearly pronounced on matter of fact, ſhut out all contrary evidence in a collateral ſuit ariſing in the courts of this country, it was ſufficient to ſay that the ſentences in queſtion had not pronounced judgment on the fact; they did not condemn the *Catherine* as enemies' property, or upon any ground recognized by the law of nations, but went avowedly on the non-compliance with certain regulations of *France* which could not bind other nations, or the courts of other nations; and upon a ſtatement of the treaty between *France* and *America* directly repugnant to the expreſs words and obvious meaning of that treaty; and 4thly, whatever conſtruction might have been put upon the policy as worded, the meaning of the parties was aſcertained beyond a doubt by the poſterior writing, whereby the Appellant agreed to pay, in caſe of capture or ſeizure, upon proof given him merely that the veſſel was an *American* bottom, and the goods ſhipped as the property of Meſſrs. *Henderſon* and Co. of *Virginia*. The Judge Admiral decreed in favour of the preſent Appellants the underwriters. Upon which the now Reſpondents, the aſſured, brought the merits of that decree before the Court of Seſſion by an action of reduction, when the Lord Ordinary pronounced an Interlocutor in favour of the aſſured, to which, after a repreſentation for the Appellants, he adhered. The Appellants,

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the underwriters, having petitioned the whole Court of Seſſion, that Court unanimouſly confirmed the interlocutor of the Lord Ordinary; whereupon the underwriters appealed to the Houſe of Lords.

The reaſons ſubmitted on the part of the Appellants were in ſubſtance,

1ſt, That the decrees of the Courts of Admiralty were concluſive as to what they decided.

2dly, That the *Catherine* being warranted *American*, and condemned as enemies' property, the warranty was negatived.

3dly, That the *rolle d'equipage* was made a neceſſary document by the treaty of 1778 between *France* and *America*.

4thly, That the explanatory agreement did not vary the queſtion between the parties.

The reaſons ſubmitted on the part of the Reſpondents were in ſubſtance,

1ſt, That there was no warranty of neutrality, and that the expreſſion of "*American* ſhip" in the policy was merely deſcriptive.

2dly, That ſuppoſing that expreſſion to amount to a warranty, the aſſured had eſtabliſhed by proofs that the ſhip and cargo belonged to *Americans*, and that the former had all the documents on board which could be procured at the ports of clearance. [Under this head was inſerted a long examination of the ſeveral modern authorities on the ſubjects of warranties in policies of inſurance, and of the effects given to foreign ſentences as negativing ſuch warranties.]

3dly, That the explanatory agreement relieved the aſſured from the effect of the ſentence of condemnation, it being ſufficient under that agreement to give ſuch proofs of the ſhip and property being *American* as were required by the agreement.

This caſe was firſt argued at the bar of the Houſe of Lords in *March* 1802, by *Dallas* and *Adam* for the Appellants, and by the Attorney General (*Law*) and *Alexander* for the Reſpondents. At that time it was ordered that the caſe ſhould be again argued, and an intimation was given that the Judges would be ſummoned to attend. Accordingly in *May* 1803, the caſe was again argued at the bar of the Houſe (the Judges attending) by the Attorney General (*Perceval*) for the Appellants, and by *Park* for the Reſpondents. On this argument the counſel on both ſides not only

ſpoke to the ſeveral queſtions, 1ſt, Whether the expreſſions of the policy amounted to a warranty? 2d, What was the true conſtruction of the ſentence of condemnation? And 3d, What was the effect of the explanatory agreement? But alſo argued at great length and with much learning, the admiſſibility in evidence of a ſentence of a foreign Court of Admiralty in an action upon a policy of inſurance, in order to falſify a warranty of neutrality.

After the argument, the Lord Chancellor put the following queſtion to the Judges, *viz.*

Whether in this caſe, taking it to be admitted that the ſhip *Catherine*, when captured, had every document on board to prove that ſhe was *American* and the cargo to be *American* property, which *American* ſhips uſually had, and which had been required by *France* on all former occaſions to aſcertain ſuch facts; and which at the time of her ſailing from *America* were known in *America* to have been required by *France* for that purpoſe; if, upon proof having been made that the ſhip *Catherine* was *American* bottom, as belonging to *American* owners, and upon its having been ſhewn by bills of lading that the tobacco inſured had been ſhipped on account and riſk of Meſſrs. *Henderſon*, *Fergusſon*, and *Gibſon*, bills payable at four months' date had, after the capture of the ſhip *Catherine*, been given to the aſſured by the underwriters for the amount of their ſubſcriptions upon the policy of the 8th *March* 1797, deducting the ſtipulated premium, and ſuch bills had remained in the hands of the aſſured until after the ſentence of condemnation of the ſaid veſſel, the aſſured could have recovered againſt the underwriters in actions brought upon ſuch bills after and notwithſtanding ſuch ſentence of condemnation, regard being had to the legal meaning and effect of the policy and ſentence, and of the agreement of the 20th *April* 1797?

On the 11th of *July* 1803, the Judges not being unanimous, delivered their opinions *ſeriatim*.

GRAHAM, B. (after ſtating the caſe). The queſtion put by your Lordſhips, apparently complicated, becomes ſimple, by ſtating as diſtinct propoſitions the *data* on which it proceeds, and it will ſtand thus: The ſhip *Catherine*, when captured, had every document on board to prove the veſſel and cargo *American* property which *American* ſhips uſually had, and which had been required by *France* on all other occaſions, and which at the time of her ſailing were known

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in *America* to have been required by *France*. After the capture proof was made that the ſhip *Catherine* was *American* bottom, and it was ſhewn by bills of lading that the cargo had been ſhipped on account and riſk of Meſſrs. *Henderſon*, *Ferguſon*, and *Gibſon*. Upon this bills payable at 4 months' date were given to the aſſured by the underwriters for the amount of their ſubſcriptions. Afterwards the ſhip and cargo were condemned, and after the condemnation of the ſaid veſſel the bills remained in the hands of the aſſured. The queſtion then is, Could the aſſured have recovered againſt the underwriters in actions brought on ſuch bills, after and notwithſtanding ſuch ſentence of condemnation? And we are directed by your Lordſhips, in conſidering that queſtion, to have regard to the legal meaning and effect of the ſaid policy and ſentence, and of the agreement of the 20th of *April* 1797. I ſhall take the liberty of conſidering this queſtion as if the underwriters had given their bills upon the firſt impreſſion of good faith, without particularly adverting to the legal effect of a ſubſequent condemnation; for if they are ſuppoſed to have given theſe bills with a diſtinct view of all poſſible conſequences, I think it can hardly be doubted but that they had bound themſelves. And in order to meet the queſtion in all its difficulty, I will ſuppoſe that it was a condemnation of the veſſel as enemies' property, without ambiguity or apparent injuſtice. This queſtion depends upon the conſtruction of the policy, and of the agreement. The policy contains no expreſs but at moſt an implied warranty of the ſhip, and no warranty of the cargo. Both parties think it requires explanation, and this agreement evidently dictated by a ſpirit of candour, and a regard to mutual accommodation, takes place. By this the underwriters acquire an undertaking on the part of the aſſured, to ſhew by bills of lading that the tobacco was ſhipped on the account and riſk of *Americans*. It is reaſonable therefore to preſume that they meant to concede ſomething, and I am at a loſs to find what that could be, unleſs it were ſomething as to the mode of proof of the property. At this period, when the mind of every honeſt man felt afflicted at the facility with which in ſome of the tribunals of *France* the moſt eſtabliſhed principles of juſtice were violated; when men of character and honour were driven from the ſeats of juſtice which they worthily filled, and their places taken by men baſe enough to become the mere inſtruments of the moſt arbitrary and wanton acts

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of power, it is reaſonable to preſume that the underwriters were perfectly aware of the little reliance which the *Americans* would have in the juſtice of the tribunals ſo conſtituted, and the inſuperable difficulties they might lie under to make available before them the cleareſt and faireſt poſſible caſes; and that it was the intention of the underwriters to relieve them from ſome of thoſe difficulties: as if they had ſaid in terms, we do not expect that you ſhould make ſuch a caſe in *France* as will prevent condemnation, but produce proofs to us of the ſhip being *American* bottom, and ſhew us your bills of lading and we will be ſatisfied, and take the riſk of unlawful force upon ourſelves. I think that the language of the agreement is ſtrongly expreſſive of ſuch an intention. The caſes provided for are capture or ſeizure. The term "ſeizure" imports an unjuſtifiable taking: if therefore the *French* privateer had as an undiſguiſed pirate run away with the ſhip without proceeding to any condemnation what were the aſſured to have done? They were to produce proof as to the ſhip, and bills of lading as to the goods, and this ſhews what they meant by producing proof, and when it was to be produced; for if the aſſured had, in the caſe of a ſeizure, without colour of juſtice, laid before the underwriters or their attorney ſuch documents as would amount to proof in a *Britiſh* court of juſtice, and ſhewn their bills of lading, the underwriters were, as I apprehend, bound to ſettle and give bills at four months' date; and by the term "ſettle" they ſeem to me to have clearly meant finally ſettle: for it muſt be a ſtrange ſettlement that by a ſubſequent condemnation ſhould be totally undone. But what they bound themſelves to do in caſe of ſuch a ſeizure, they bound themſelves to do in caſe of capture under colour of lawful prize; for the language of their engagement applies to both, without poſſible diſtinction on the face of the inſtrument. If they meant a diſtinction, is it poſſible to ſuppoſe, that they would not have provided for it by ſaying, that if the ſhip ſhould be condemned as lawful prize the bills or money ſhould be reſtored? Nay, would they not have provided for the caſe by ſaying that the bills ſhould not be negotiated till that event were known? On the contrary, they agree to ſettle by granting bills which the next moment may be negotiated, and neceſſarily become payable, and they ſtipulate, as the only ſecurity which they ſhould have a right to exact, that the inſured would come forward in their neutral character, and uſe their beſt endeavours to recover

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their property as for themſelves, but, in fact, as truſtees for the underwriters. They conſider capture or ſeizure as the ſame thing, as neceſſarily entailing a loſs upon themſelves, and impoſe upon the underwriters, as the only thing required of them, an obligation to uſe their beſt endeavours to recover the property: this, too, muſt mean after condemnation, or in the proſpect of that event; for before condemnation it was the intereſt of the underwriters that the inſurers ſhould uſe no endeavours to recover the property, in conſequence of which a condemnation would take place, leſs exceptionable, perhaps, than the preſent, and in virtue of which the underwriters would be abſolutely diſcharged. But it is ſaid that producing proof imports a right in the adverſary to conteſt the evidence adduced, and to diſprove it if he can, and that the underwriters by this agreement cannot be intended to have renounced that right: true; but can it be underſtood that the underwriters, in conceding the liberty of producing proof, and ſhewing by bills of lading, *&c.*, meant to avail themſelves of a condemnation which totally ſilenced and annulled that proof? At leaſt they muſt mean that the legality and truth of ſuch condemnation might be conteſted. If a right be implied in favour of the underwriters on this agreement to conteſt the neutrality, ſurely the expreſs right to the aſſured to produce proof and bills of lading muſt mean, that their proof ſhould be heard and weighed. To me it ſeems clear, that the underwriters looked to an inquiry at home, and not in a foreign court; for in caſe of capture or ſeizure, all that the aſſured are required to do as a condition precedent is to produce proof of the ſhip being *American* bottom, and ſhew by bills of lading, *&c.*; not a word is ſaid of waiting for the event of condemnation: a moſt material circumſtance, if intended, and I am authoriſed to ſay, by the manner in which this caſe is put, that after compliance with thoſe expreſs requiſites, they were bound to give the bills, and bound to give them as upon a ſettlement, which imports, to my underſtanding, a final ſettlement and concluſion of the tranſaction. I therefore think, that this is a caſe in which the aſſured have performed, on their part, every thing that was required of them by the underwriters, and that they are entitled to demand a full performance of the engagement on the part of the underwriters, by granting bills at four months; and I think that ſuch bills were intended, as they purport to be, irrevocable and unconditional ſecurities, and that the ſubſequent condemnation is no bar to a recovery on them in the hands of the aſſured themſelves. Having come to this concluſion on ſuppoſitions

ſitions that the condemnation was clearly on the ground of enemies' property, I am relieved from the neceſſity of ſaying what I think of theſe diſgraceful ſentences, and how far an *Engliſh* court of juſtice is bound to adopt their concluſions, when directly contrary to the premiſes from which they are drawn. The ſentences in ſubſtance, and almoſt in terms, ſay this; The ſhip is *American*, the goods are *American*, but the captain had not on board that which he was not bound to have, which he could not by any poſſibility know was required of him; and therefore we deem them (what no rational being can) to belong to enemies of the Republic. I cannot: for this record, be it what it may, amounts to this: We pronounce them enemies' property becauſe we are bid, and dare not do otherwiſe. To receive ſuch ſentences as concluſive would be in effect to ſay that we give no credit to what they truly ſtate, but abſolute credit to what they falſely conclude. As to the argument of the impolicy of contracts by which the loſſes of neutrals (as the *French*, it is ſaid, are ſtudious to contrive) are thrown upon ourſelves, and the neutral nation prevented from aſſerting with energy its rights as ſuch, being indemnified againſt the acts of violence and injuſtice of one of the belligerents, it opens too wide a field of conſideration; it is rather the ſubject of diſcuſſion with a view to regulation, and has too much of novelty in it in courts of juſtice to form the ground of a legal objection to a contract in other reſpects fair and unexceptionable. I am therefore of opinion that, under the circumſtances ſtated by your Lordſhips, the aſſured could have recovered againſt the underwriters in actions brought on the bills, after and notwithſtanding the condemnation.

CHAMBRE, J. In offering my opinion on the queſtion propoſed by your Lordſhips, I ſhall firſt conſider the legal meaning and effect of the agreement referred to at the cloſe of the queſtion, and whether the intention of that agreement was in caſe of loſs by capture or ſeizure to make the underwriters at all events liable to ſuch loſs, independent of any effect which a ſentence of condemnation might otherwiſe have had upon the warranty contained in the policy, there being ſuch proof of the fact warranted as would have been ſufficient if no ſuch ſentence had been pronounced, and aſſuming for the preſent that ſuch ſentence would otherwiſe have had a concluſive effect upon the warranty. If it can be clearly collected from the agreement, as is expreſſed in the writing ſigned by the underwriters, that ſuch was the real meaning and intention of

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the parties, that intention muſt prevail; but I think we muſt diſcover the intention by ſomething more than bare poſſibility or conjecture. At the time when the agreement was made the underwriters had by the terms of the policy a clear right to all the advantages of a warranty that the ſhip was *American*, it having been long ſettled that ſuch a deſcription as is contained in this policy does amount to a warranty. Having this right under the policy, the underwriters cannot in my opinion be deprived of it, unleſs their intention to abandon the right is equally clear. Let us ſee then what the terms of the agreement are, what are the doubts which had ariſen in the minds of the parties, and how they endeavour to clear thoſe doubts. It begins by reciting that doubts had ariſen how far by the inſurance on tobacco made by the policy in queſtion there was a warranty of property, and what was to be underſtood by ſuch a warranty. The bare recital of theſe doubts ſhews that the parties to this inſurance had not much experience in matters of inſurance, and did not poſſeſs that knowledge of the ſubject which merchants and underwriters in general do, which may afford ſome argument againſt affecting their intereſts by ſuch preſumptions as could only ariſe from ſuppoſing them perfectly conuſant of the legal reſult of every circumſtance that might happen to the property or ariſe in the conduct of the aſſured. The doubts however that had been entertained they ſolve in this way: They declare, that in caſe of capture or ſeizure the aſſured, before they claim for a loſs, muſt produce proof of the ſhip being an *American* bottom, and by bills of lading ſhew that the tobacco ſhall have been ſhipped on account and riſk of Meſſrs. *Henderſon*, *Ferguſſon*, and *Gibſon*. Here they put it out of all doubt that the fact of the ſhip being an *American* bottom was meant to be warranted, and that diſpoſes of all the arguments ariſing from the ſuppoſed high rate of premium. They not only put the warranty of the ſhip out of doubt, but they add, what was not contained in the policy, an engagement on the part of the aſſured to prove (but only in the manner there mentioned) the ſhipping of the tobacco on account and riſk of the particular perſons mentioned in the agreement. In this part of the agreement the parties ſeem to diſcover a further degree of ignorance upon the ſubject, and to have ſuppoſed that the warranty could become material only in the caſes of ſeizure and capture. This however being a caſe of capture, it is not neceſſary to determine whether by that mode of expreſſion in the agreement the warranty is narrowed to thoſe two

caſes or not. The agreement having thus required proof generally of an *American* bottom, and a particular mode of proof as to the other fact, proceeds thus: "Upon which we ſhall ſettle by granting our bills at four months' date for the amount of our ſubſcriptions, deducting the ſtipulated premium, in full dependence that the inſured will uſe their beſt endeavours to recover the property as for account of the ſhippers." The doubts, if there be any, on the effect of the agreement muſt ariſe from this latter part of it, coupled with the requiſition of proof in the former part; and it is contended at the bar, that the underwriters, having agreed that upon proof of the ſhip being *American*, and production of bills of lading, they will pay the amount of their ſubſcriptions by bills at four months, and ſtipulating for or rather expreſſing their reliance on the endeavours of the aſſured to recover the property, are bound to pay upon a diſcloſure of ſuch documents and evidence, as ſuppoſing no ſentence produced would entitle them to recover in a court of juſtice; that the underwriters are bound by the ſtate of the evidence at the time of the capture, or of the notice of it, and are not entitled to the benefit which would ariſe to every other underwriter from a condemnation of the property as enemies' property. I cannot accede to ſuch a conſtruction of the agreement. What is meant by the requiſition of the proof, no particular ſpecies of proof being mentioned? Surely proof in a court of juſtice, if required. Strictly ſpeaking, what is produced or communicated in the private tranſactions of the parties themſelves is not proof. If underwriters are ſatisfied by what is diſcloſed to them, they may pay; if they withhold payment and are diſſatisfied without reaſon, they will ultimately have further damages to pay. But can it be ſaid that under this agreement they may not go into a court of juſtice and require the proof to be made in the uſual manner; and if they do, is it to be *ex parte* evidence? Is the Defendant to be precluded from oppoſing it by contrary evidence, or any evidence that will deſtroy the effect of the Plaintiff's evidence? And why is an underwriter to be precluded from giving evidence of a ſentence any more than he would from giving evidence of fraud, forgery of documents, miſconduct of the aſſured, or any other matter that would repel the juſtice or legality of the Plaintiff's claim. I ſhould require a very clear and explicit declaration of intention to induce me to hold that opinion. Suppoſe the ſentence of condemnation to arrive at the ſame time with the intelligence of the capture. Is the evidence to be taken par-

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tially? Is that the declared intent of the parties? And if the whole is to be received as evidence, muſt not the ſentence have its legal effect? How does that caſe differ from the preſent? If before a ſentence was pronounced, or before the evidence of it was received, the parties ſhould proceed to a trial, and the Plaintiffs recover by the judgment of the Court, I admit that they might not be compellable to refund, becauſe the Court who tried the cauſe had cognizance of the fact, and acted right upon the evidence; but in this caſe concluſive evidence has arrived in due time, and the Court in which this action was tried I think was bound by that evidence. It ſeems impoſſible that the mode of payment by bills ſhould make any difference. If that had not been ſtipulated, the money would have been payable immediately upon the loſs. If no credit had been given, an action would have immediately lain, ſuppoſing that there was no fact in the caſe that afforded a legal anſwer to it. The credit is for the benefit of the underwriters, and not of the aſſured. With reſpect to what is ſtated in the agreement reſpecting the endeavours of the aſſured to recover the property, no neceſſary concluſion ariſes from thence. Arreſts, takings at ſea, detainments, *&c.* are among the riſks inſured againſt. There are many caſes in which thoſe endeavours might be of important uſe to the underwriters, as in the caſe of capture and recapture. So in the caſe of a capture or ſeizure without any ground of condemnation and terminating in a diſcharge, the underwriters would be liable for the damage ſuſtained, and greatly intereſted in the endeavours of the maſter to explain his ſituation, and obtain a ſpeedy diſcharge. I think it moſt probable that nothing reſpecting a ſentence of condemnation was at all in the contemplation of the parties; if it had been, ſurely nothing could have been more eaſy than to have ſaid, in expreſs terms, that the policy ſhould not be affected by the ſentence of any foreign Court. It appears to me therefore that the explanatory agreement has not varied the queſtion. I ſhall now proceed to conſider the effect of the *French* ſentence of condemnation in this caſe; and attending to the language of that ſentence I cannot but be of opinion that the *French* Court founded its deciſion on the fact of the ſhip *Catherine* being enemies' property. This being my opinion, I think the ſentence concluſive againſt the claims of the aſſured, agreeable to all the deciſions upon the ſubject, beginning with the caſe of *Hughes* v. *Cornelius* (*a*), (confirmed as that was

(*a*) 2 *Show.* 232. *Raym.* 473. and *Skin.* 59.

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suing them down to the preſent period. It is true, that in *Hughes* v. *Cornelius* the queſtion upon the foreign ſentence aroſe in an action of trover, and not in an action on a policy of aſſurance where the non-compliance with a warranty of neutrality is in diſpute. But from that period to the preſent the doctrine there laid down reſpecting foreign ſentences has been conſidered equally applicable to queſtions of warranty in actions on policies, as to queſtions of property in actions of trover. It has been ſuppoſed indeed that the caſes warrant a diſtinction between thoſe ſentences which expreſsly take into conſideration and ultimately decide the non-neutrality of the ſhip, and thoſe in which the ſame point does not appear to have come ſo immediately under the conſideration of the foreign Courts. But I think wherever the Courts in this country have been able to collect from the ſentence that the point of neutrality has been decided, they have held themſelves bound by that deciſion. Indeed the doctrine upon this ſubject is moſt ably ſummed up in the admirable judgment of the Maſter of the Rolls, in *Kinderſley* v. *Chaſe* (*b*). Had the *French* ſentence in this caſe merely ſtated the *French* ordinances, without concluding as they have done, this caſe might have fallen within ſome of the late determinations of the Court of King's Bench. But the *French* Court has gone further in their determination, and app ne facts and the ordinances they have drawn a concluſion which perhaps no court in this country would have done, but by which they have decided that the ſhip *Catherine* being an *American* had forfeited her neutrality. I am therefore of opinion that the aſſured are bound by this decree of the *French* Court. A queſtion has been raiſed in

condemnation had arrived, they could have legally refuſed payment of their bills? Suppoſing the bills ſo given to have been indorſed over into other hands, undoubtedly payment of the bills could not have been reſiſted. Connected with the firſt queſtion another enſues, *viz.* Whether, if the money had been actually paid, it could have been recovered back? I think payment of the bills while in the hands of the aſſured might have been reſiſted, or the money, if paid, might have been recovered back. If the ſentence be conclu-

(*a*) *Green* v. *Waller*, 2 *Ld. Raym.* 893, and *Ewer* v. *Jones*, 2 *Ld. Raym.* 935.

(*b*) Vide *Park's Inſurance*, 5th edition, p. 363.

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ſive, it muſt be concluſive to all purpoſes whatever, and muſt overturn every fact eſtabliſhed by other evidence. If ſo, the bills would have been given under a miſtake of what ultimately turned out to be really the fact, and then the conſideration upon which they were given would have failed *ab initio*.

LE BLANC J. The queſtion which your Lordſhips have been pleaſed to propound to the Judges appears to me neceſſarily to involve theſe objects for conſideration: The legal meaning and effect of the policy of inſurance; of the ſentences of condemnation by the ſeveral courts of Admiralty in *France*; and of the memorandum of agreement ſubſcribed by the underwriters of the 20th *April* 1797. If, on mature conſideration, we had been able to concur in opinion on the meaning of the ſubſequent agreement, and our opinion had been unanimous in favour of that conſtruction contended for at the bar by the counſel for the Reſpondents, the aſſured, it might perhaps have been ſuperfluous to have entered into the conſideration of the two firſt points; *viz.* the meaning and effect of the policy and of the ſentence; becauſe if, as the aſſured inſiſted, the ſubſequent agreement meant to exclude from the proofs in the cauſe any ſentence which might be made in any court of Admiralty or prize, or to give to the words of the policy a different conſtruction from that which the inſtrument on the face of it imports; I ſay, if that had been the clear effect of the agreement, it would have taken this caſe out of the general rules of law, as applicable to caſes reſting ſolely on a policy and ſentence of condemnation ſuch as appear in this caſe. But, inaſmuch as we have not been able to arrive at the ſame concluſion in our ſeveral modes of conſtruing this agreement, it may be thought right, at leaſt for ſuch of us as may happen to diſſent from the conſtruction put on it by the counſel for the aſſured, to offer to your Lordſhips our opinion on the effect of the policy and ſentence which, in our view of the memorandum, becomes material to be conſidered in order to furniſh an anſwer to the queſtion ſubmitted to us. It has ſcarcely been denied at the bar, that the terms of this policy, "of and in the good ſhip or veſſel called the *Catherine*, an *American* veſſel," amount to an expreſs warranty of the ſhip being *American*, which was a neutral nation in the war, nor could it have been otherwiſe contended after the uniform current of authorities in which ſuch an averment has been decided, or taken for

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granted to be a warranty, as much as if the word warranted had been inſerted in the policy; for I take this to be an eſtabliſhed propoſition, that every poſitive averment or allegation on the face of the inſtrument, and making a part of the written contract, whether inſerted in the body of it, or written in the margin in a line with the body of the inſtrument, or tranſverſely, amounts to a warranty, or condition. And if ſuch allegation or ſtipulation be not ſtrictly true, the aſſured cannot recover on the policy to whatever cauſe the loſs be owing, whether the loſs be connected with the ſubject of ſuch warranty, or wholly independent of it: for it is a condition on which the contract is to take effect, which failing, the contract fails. Such being the effect of the allegation in the policy, "an *American* veſſel," the next queſtion is as to the meaning and effect of the ſentence of condemnation of the Admiralty Courts in *France*. The firſt ſentence of the Tribunal of Commerce of the canton of *Nantz* ſtates, in the outſet, what the queſtion is, thus: The queſtion is to know, Whether the *American* ſhip, *Samuel Cazneau* maſter, and her cargo, are to be declared lawful prize? It then ſtates the circumſtance of the capture and examination of the perſons and papers on board; and, maturely weighing the whole matter, and conſidering the ſeveral circumſtances, and articles of their laws; conſidering, laſtly, that every ſhip declared enemy and good prize carries with it, of courſe, the confiſcation of her cargo; the Tribunal decrees and declares lawful prize the ſhip *Catherine*; decrees and declares farther, lawful prize all the goods and effects which compoſe the cargo; ſince the whole, owing to the captain, *Samuel Cazneau*, not being provided with proper and regular diſpatches and papers, is to be deemed the property of the enemies of the *French* Republic. The ſecond ſentence of the Court of Appeal of the Civil Tribunal of the department of the *Lower Loire*, ſitting at *Nantz*, ſtates, that the privateer ſtopped the ſhip *Catherine* becauſe ſhe was not provided with papers ſufficient to prove her neutrality, and particularly a *rolle d'equipage*, and that the firſt ſentence had adjudged both ſhip and cargo lawful prize. This Tribunal, conſidering, &c. decrees by judgment in the laſt reſort, that it has been rightly determined by the ſentence from which he appeals, orders that that judgment ſhall obtain its full and entire effect, and condemns the Appellant in coſts. On reading theſe ſentences, is there any doubt of their meaning? Is it not clear that the Court condemned the ſhip as being,

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being, or as being to be considered as enemies' property, which is the same thing? The first sentence condemns her as lawful prize, and adjudges her to be considered, deemed, or taken, as belonging to enemies of the Republic, and states the evidence and grounds by which they are led to that conclusion. The sentence of the Court of Appeal, introducing itself by stating the cause of her being stopped to have been that she was not provided with papers to prove her neutrality, decrees that it has been rightly determined by the Court below, and affirms the sentence *in toto*, with costs of appeal. What is this but adopting the grounds on which the Court below had decided? It is evident, on reading these sentences, that the Courts meant and professed to determine that she was to be considered as enemy's property, and liable to condemnation as such. If that be so, the sentence falsifies the warranty or allegation in the policy that she was *American*. And no case can be found in which a court of law here has taken upon itself the examination of and exercise of any jurisdiction over the propriety of the conclusion which the courts abroad have come to or the evidence from which they have drawn that conclusion, where they have concluded her to be prize. Where, indeed, the Court has seen on the face of the sentence that the court abroad has condemned the ship on other grounds than as being enemies' property, we have held that such sentence did not falsify the warranty of *American* or neutral; and so far only have our Courts here looked into the sentences of the Courts of Prize as to see whether the property was condemned as enemies' or not. But wherever it has appeared by the sentence that the Court abroad has come to the conclusion that the ship was or was to be deemed or considered as enemies' property, no matter by what deductions they came to that conclusion, we have uniformly held ourselves bound by their conclusion, without feeling ourselves at liberty to examine their premises. This will be found to be the result of the decisions in *Mayne* and *Walter* (*a*), and *Bernardi* and *Motteux* (*b*), in the time of Lord *Mansfield*; and *Pollard* and *Bell* (*c*), *Bird* and *Appleton* (*d*), and *Price* and *Bell* (*e*), in the time of Lord *Kenyon*; and of *Baring* and *Claggett* (*f*), lately decided in the Court of Common Pleas. The language of our Courts has uniformly been, We will not examine the justice or propriety of the sentence; we will only look into it to see what it has professed to determine; and if

(*a*) *Park. Insur.* 363.
(*b*) *Doug.* 554.
(*c*) 8 *T. R.* 434.
(*d*) 8 *T. R.* 562.
(*e*) 1 *East*, 663.
(*f*) 3 *Bos. & Pull.* 201.

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we find that it has profeſſed to determine on the ground of the property being enemies', we will hold ourſelves bound by it, although from the premiſes ſtated we ſhould, if it had been competent to us, have drawn a different concluſion. Lord *Mansfield*, in *Bernardi* v. *Motteux*, in anſwer to an obſervation of Mr. *Lee*, of the danger and inconvenience of examining foreign ſentences, ſays, "this ſuppoſed inconvenience would be entirely obviated, if the foreign Courts would ſay, in their ſentences, *condemned as enemy's property*." That theſe ſentences are admiſſible and concluſive evidence of the fact they decide, it ſeems not ſafe now to queſtion; from the time of *Car.* 2. to this day they have been received as ſuch, without being queſtioned. In the diſcuſſion of the nature of ſuch evidence before this Houſe, in 1776, it ſeems not to have been controverted; and the caſes, I may ſay, are numberleſs, and the property immenſe, which have been determined on the concluſiveneſs of ſuch evidence, in many of which caſes the forms in which they came before the Courts in *Weſtminſter-hall* were ſuch as to have enabled the parties if any doubt had been entertained, to have brought the queſtion before a higher tribunal. Such being the conſtruction of the policy, and ſuch the meaning and effect of the ſentences as applicable to ſuch policy, it remains to be conſidered what is the effect of the memorandum or agreement of 20th *April* 1797, ſigned by the underwriters. Independent of that agreement, the ſituation of the underwriters and aſſured ſtood thus: the inſurance depended on the condition of the ſhip, being *American*; if a loſs happened from whatever cauſe, by ſea riſk, by fire, by capture, detention, or ſeizure, it would be incumbent on the aſſured, to entitle themſelves to an indemnity from the underwriters, to prove that the ſhip was *American*, that proof might be anſwered and controverted in any way by the underwriters; and in caſe of a capture and ſentence of condemnation as prize ſimply, or on the ground of enemies' property, ſuch ſentence would be concluſive againſt the claim of the aſſured. Such being the legal rights of the parties under the policy, does the memorandum ſhew a clear and manifeſt intention in the underwriters to ſurrender their right of combating any proof which the aſſured might bring forward of the ſhip being *American*, or to narrow the warranty under which they had contracted? I cannot find ſuch clear intention on the face of the memorandum. It recites that doubts had ariſen how far there is a warranty of property, (does not ſay in the ſhip or the goods; and as to the goods there

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was not any warranty,) and what is to be underſtood by ſuch a warranty. It is declared, that in caſe of capture or ſeizure the aſſured, before they claim for a loſs, muſt produce proof of the ſhip's being *American* bottom; it does not ſpecify any particular proof, but of courſe leaves it open to the aſſured to bring any proof, and to the underwriters to meet that by any contrary proof. Now on this part of the caſe, ſuppoſe notice of the capture and condemnation had reached the parties at the ſame time, would this have prevented the underwriters making uſe of the ſentence to rebut proof produced by the aſſured, or to preclude ſuch proof being given? With reſpect to the goods, the memorandum points out the particular proof, *viz.* the bill of lading; but no ſuch ſpecific proof is pointed out as applicable to the ſhip, but it is left on proof generally, which includes every ſpecies of proof, and contrary proof, "upon which we ſhall ſettle by granting bills at 4 months," that is, upon ſatisfactory proof. Then comes the latter clauſe, "in full dependence that the inſured will uſe their beſt endeavours to recover the property as for account of the ſhippers." This may be ſaid to infer that the underwriters looked to the caſe of a capture and condemnation as the event on which they would pay, leaving it to the aſſured to procure a reverſal of the ſentence, or reſtitution of the goods. But is that a neceſſary inference? The terms uſed are in caſe of capture or ſeizure generally; and there may be caſes where underwriters may be called on to pay as for a loſs by capture or ſeizure where there may be no condemnation, as a capture and ſubſequent re-capture, a ſeizure or capture by pirates, *&c.* in which, labour and expence might be neceſſary to procure a return of the goods. It ſeems to me as if they did not contemplate the caſe, or the effect of the ſentence; ſuppoſe this agreement had been in the body of the policy, it appears to me that this clauſe does not neceſſarily infer an intention in the underwriters to ſtipulate for payment of the loſs in caſe of capture, renouncing the clear right veſted in them by the terms of the policy of uſing a ſentence of condemnation as enemies' property, as evidence to negative the averment in the policy, which was a term or condition of their ſubſcription. And where their right is clear on the original contract, and the law as applicable to it, it is not to be taken away by doubtful words. On the whole therefore I humbly ſubmit it as my opinion to your Lordſhips, that by the terms of this policy the aſſured have warrant-

ed the ship *Catharine* to be *American*, if that be falsified, the contract of assurance becomes void; that the sentence of a Court of Admiralty abroad, being a sentence of a Court of exclusive jurisdiction proceeding *in rem*, condemning the ship as enemies' property, is conclusive evidence to falsify the averment in the policy of her being *American*; that the sentence in this case has condemned as enemies' property, and therefore has falsified the averment in the policy; and that the agreement subscribed at the foot of the policy does not sufficiently manifest an intention in the underwriters to preclude themselves from the use of any species of evidence which the law allows to falsify the warranty, or otherwise to restrain or limit the legal effect of the warranty in the policy in case of capture or seizure.

LAWRENCE, J. The proof of the ship *Catharine* being an *American* bottom, upon which proof the underwriters are supposed by the question to have given bills at four months, is, I apprehend, to be taken as proof, without the concealment of any fact or circumstance which existing at the time might weigh in the judgment of the underwriters as to their obligation to give those bills, and under such circumstances I think the assured could have recovered against the underwriters, in actions brought upon such bills, after and notwithstanding such sentence of condemnation, regard being had to the legal meaning and effect of the policy and sentence, and of the agreement of the 20th of *April*. And the grounds of my opinion are, that in such case the bills would have been given without any fraud practised upon the underwriters to induce them so to do. They would have been given with a communication of every existing fact material for their consideration, with a knowledge of the capture, and without any desire to delay payment till a decision as to its legality; such case would have involved no ignorance of fact; there would have been no mistake or deceit; the giving the bill would have been the voluntary act of the parties; the not requiring the granting them to be delayed until a decision as to the legality of the capture, would have been a waver of any advantages arising from what might have been the event of such determination. In my opinion, in such case there would have been a good consideration for the bills; *viz.* the premium received by the underwriters, the capture of the vessel, and a fair disclosure of all circumstances required by them to enable them to determine whether they

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ſhould ſettle the loſs or wait the event of the proceedings againſt the ſhip, and if there would have been a good conſideration, the conſequence is, that the aſſured would be able to recover on the bills. In *Knibbs* v. *Hall*, 1 *Eſp.* 84. where one paid money to avoid a diſtreſs, Lord *Kenyon* held, that being a voluntary payment it could not be recovered again; and in *Bilbie* v. *Lumley*, 2 *Eaſt*, 469. it was held, that if a party pay money with a full knowledge of all the facts of the caſe, he ſhall not recover it back on account of his ignorance of law. But as the conſideration of the queſtion upon this narrow ground will not, as I apprehend, anſwer the purpoſes for which your Lordſhips directed our opinion to be taken, I proceed to ſtate what appears to me to be the law upon thoſe other points ariſing out of the queſtion; firſt, Whether the explanatory agreement ſhuts out the effect of the ſentence of condemnation? And 2dly, What is the effect of that ſentence? With reſpect to the explanatory agreement, or rather explanatory declaration, I think with thoſe of my brethren who have already delivered their opinions, that it has not at all varied or narrowed the ſort of proof, which it is in general competent to the aſſured to adduce in ſupport of his claim, or to the underwriters to uſe in reſiſting it. It is extremely probable that neither of the parties underſtood the ſubject ſufficiently to advert to and provide for the queſtions which ordinarily ariſe from the variety of events to which ſuch a voyage is ſubject, and it is poſſible that their deſign may have been to ſettle their rights, without regard to the ſentence of any Court in caſe of capture. But this does not in my opinion go further than conjecture. And I think it by no means clear that the underwriters intended by this declaration any thing more than to explain to the aſſured (who ſeem to have been little acquainted with the conſtruction put upon policies) the meaning and effect of the inſtrument, without any deſign of altering or varying the circumſtances according to which, by the forms of the policy, they were liable for the loſſes inſured againſt. But if this declaration has ſubjected the underwriters to a loſs under circumſtances different from thoſe by which only they could be affected according to the terms of the policy, it muſt be either from the loſs by capture being the only one which is noticed by this declaration, or from the mode in which the loſs was to be ſettled, or from the reliance which the underwriters profeſs to place in the endeavours of the agents of the aſſured to recover the property as

for the account of the ſhippers. Had there been no ſuch agreement or declaration, and the claims of the aſſured had reſted merely on the policy, they would have had no demand on the underwriters without being able to prove the ſhip an *American* ſhip, and it would have been competent to the underwriters to controvert the proofs adduced by contrary proofs, and among other proofs by the ſentence of the tribunal of *Nantz*, ſuppoſing it to be admiſſible in evidence. It is there to be ſeen, firſt, whether mentioning the caſe of capture only, and not taking notice of any other loſs, will make a difference as to the proof; and I conceive it will not. For it ſeems to me, that the only effect of thoſe words, giving them their utmoſt latitude, is to narrow the warranty to the caſe of capture, and to ſubject the underwriters to every loſs except that of capture, though the ſhip were not *American*; but if a loſs were claimed in conſequence of capture, ſhe muſt then be proved to be an *American* bottom. The only poſſible effect they can have ſeems to me to narrow the extent of the warranty, but not the nature of the proofs: there is nothing in the agreement deſcriptive of them, as that it ſhall be ſufficient to prove it by bill of ſale, regiſter, ſea-letter, or other document. Nothing is pointed out as the proof which will be ſatisfactory, as is the caſe with the tobacco, where the bills of lading are mentioned; but what the proofs to be produced may be is left generally, without any reſtriction to be determined in caſe of diſpute, by the rules of law. The next part of the agreement from which it may be argued that the loſs was to be paid, without regard to the ſentence, is that by which it is agreed, that upon proofs being produced of the ſhip being an *American* bottom, and upon its being ſhewn by bills of lading that the tobacco was ſhipped by *Henderſon* and Co., that the underwriters would ſettle by bills at four months' date. But this does not, I think, vary the obligation of the underwriters. The force of any argument derived from this proviſion, muſt, as it appears to me, reſt on this aſſumption, that the bills might be required before ſentence, and that it could never be the intent of the parties that the payment of thoſe bills ſhould be defeated by a ſentence given after the bills were granted, or that money paid ſhould be refunded, to effect which it might be neceſſary to have recourſe to perſons on the other ſide of the *Atlantic*. In anſwer to this argument I think it may be ſaid, that the queſtion is the ſame as if the agreement had been to pay in money upon producing proof that the *Catherine* was an *American* bottom; and if

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the time of payment is to weigh, the more immediate the payment the ſtronger the argument ariſing from thence. If the agreement had been to pay in money, it would have left matters in that reſpect on the foot of the policy, or would not have varied the obligation of the underwriters: and had the aſſured proceeded againſt the underwriters before the ſentence of the Prize Court, the deciſion of which might affect and be material in determining the rights of the parties, all proceedings would, according to the practice of our Courts, have been ſtayed until ſuch deciſion had. If, in that caſe, the underwriters could not be compelled to pay the money, they could not, in this, be compelled to grant the bills. The obligation to pay, or give ſecurity for payment at a future time, ſtands, as it appears to me, exactly on the ſame foundation, *viz.* the aſſured being able to produce proofs of the performance of that condition, which rendered the underwriters liable. The time from which the bills would have to run would be the producing proof of the ſhip being an *American* bottom, and the production of the ſpecified bills of lading. But that proof muſt be allowed to be examined; it muſt be competent to the underwriters to object to the proofs not being complete; and if time ſhould be neceſſarily ſpent in that examination, without any effect which could contribute to a ſucceſsful reſiſtance of their payment, and if the proofs produced were, on their firſt production, complete to eſtabliſh every fact compriſed in the warranty, their date muſt refer back to the production of that proof which was not weakened by examination; and if more time ſhould be ſpent in the examination than the time mentioned in the bill, the underwriters, who would have unſucceſsfully delayed the payment, muſt make a compenſation in damages for that delay, juſt as they would if the loſs had been payable in money. The fallacy of the argument deduced from this part of the agreement conſiſts in conſidering the underwriters liable to grant their bills at four months, under circumſtances which, if the ſentence is not laid aſide, might, in the event, lead to a ſuppoſition ſo improbable, as that it ſhould be in the contemplation of the parties to pay large ſums of money, and afterwards reſort to perſons in *America* to recover them back. But if by law, they would not be liable in an action for not granting the bills until the deciſion of the Prize Court, the difficulty is removed: the underwriters would not have the inconvenience of reſorting to *America*, but only that of being liable to intereſt for a delay of payment.

payment. The laſt circumſtance in the agreement from whence it may be inferred that it was intended to ſhut out any effect of the ſentence of a Prize Court, is the dependence which the underwriters place in the agents of the aſſured to uſe their beſt endeavours to recover the property, as for account of the ſhippers. In order to found any argument on this circumſtance to prove that the underwriters meant to pay the loſs without any regard to the ſentence, it muſt be ſhewn that ſuch proviſion as this was meant to be applied to every caſe of capture, and among them to the caſe which has happened of the captured veſſel being condemned as enemies' property, for as I underſtand the argument it is this; the underwriters look to the inſured to recover the property in caſe it be condemned as enemies' property; but this they could not have ſtipulated for, unleſs they had meant to pay the loſs if the ſhip ſhould be condemned on that ground. The force and effect of this argument ariſes from a ſuppoſed inconſiſtency in ſuch proviſion with the underwriters inſiſting on the ſentence in anſwer to the demand of the aſſured. But the argument has no foundation if the endeavours are properly to be referred only to thoſe caſes in which ſuch endeavours might be exerted for the benefit of the underwriters, conſiſtently with their being able to make uſe of ſuch ſentence; for no argument can be drawn to prove them liable in a caſe falling within the condition or warranty from a proviſion to ſecure to them a benefit in caſes where, by the terms of the policy, they would be liable for a loſs. In the caſe of capture and acquittal, the voyage might be defeated, and the aſſured be entitled to abandon, and call on the underwriters as for a total loſs. But I think thoſe caſes ſufficiently account for this proviſion, without making uſe of a ſtrained inference to render the underwriters reſponſible in a caſe where, by the terms of the policy, they are not liable; to do which, this dependence on the endeavours of the aſſured muſt be extended to the caſe of capture and condemnation as enemies' property, inſtead of its being applied to other caſes to which it may be referred conſiſtently with the engagements of the underwriters, conſtrued in the manner in which they are uſually underſtood. The dependence of the underwriters on *Henderſon* and *Riddell* to uſe their endeavours to recover the property, as for account of the ſhippers, is in effect nothing more than a dependence that they will endeavour, in caſe of ſeizure or capture, to get back the tobacco on account of the perſons who ſhipped it, by

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which the claim on the underwriters would be diminiſhed in thoſe caſes where a claim could be made. But the underwriters could only have wiſhed for ſuch endeavours in caſes where ſome benefit might reſult to them from thoſe endeavours, which could only be by leſſening the loſs in caſes where they would be liable; and if we look at the policy to diſcover thoſe caſes, that of hoſtile capture and condemnation is not one, and if we refer to the antecedent part of the explanatory declaration, there is nothing, for the reaſons I have ſubmitted to your Lordſhips, from whence it can be collected that the underwriters meant to extend their reſponſibility beyond the terms of the policy. The remaining point to be conſidered is the legal effect of the ſentence of the Tribunal of Commerce of the canton of *Nantz*. As to which, after the continued practice which has taken place from the earlieſt period, in which, in actions on policies of inſurance, queſtions have ariſen on warranties, to admit ſuch ſentences in evidence, not only as concluſive *in rem*, but alſo as concluſive of the ſeveral matters they purport to decide directly, I apprehend it is now too late to examine the practice of admitting them to the extent to which they have been received, ſuppoſing that practice might, upon the argument, have appeared to have been doubtful at firſt. On the authority of thoſe deciſions men have acted for a long ſeries of years, and entered into contracts of aſſurance in this country with a perfect knowledge of ſuch deciſions, and, in expectation of the queſtions ariſing out of ſuch contracts, to which ſuch deciſions are applicable, being ruled by them; and though it might have been at firſt much better, in the interpretation of policies of aſſurance, to have given them a a much narrower conſtruction, and not to have held warranties to the extent to which they have been carried, to be inferred from ſuch words as are uſed in this policy, or from ſimilar expreſſions of great generality; yet ſuch expreſſions having, by a variety of deciſions as to their effect, acquired a defined and known ſenſe and meaning, according to that ſenſe and meaning they muſt now be underſtood; and after the many caſes in which, in contradiction of a warranty of neutrality, ſentences of Courts of Prize have been received in evidence, a warranty of neutrality muſt, I conceive, now be underſtood as containing in itſelf, amongſt other things, a ſtipulation that the contract of aſſurance ſhall be void if the ſubject-matter warranted neutral be condemned as enemies' property; and if a warranty of neutrality contains this ſtipulation, the ſentence of

a court of competent jurisdiction condemning a ship on account of its want of neutrality, is the proper evidence, according to every principle and rule of our law, to determine that fact. In receiving such sentences in evidence, the Courts of *Westminster-Hall* have not in any instance of which I am aware ever taken upon themselves to review or consider the propriety of the determinations of any Court of Prize; but, on the contrary, have expressly renounced any such authority. Where the sentence has expressly condemned a vessel as enemies' property, they have held themselves bound by such determination; and they have never looked at any other part of the proceedings than the sentence, or examined the reason of it but with a view of discovering the ground of such determinations in cases, where that ground was not distinctly marked and pointed out by the sentence; and in doing this, I conceive that any circumstance to be found in the proceedings, or adduced in evidence, from whence the sentence may be inferred with sufficient certainty to have proceeded upon grounds inconsistent with the warranty, would make such sentence conclusive against the warranty. If it appeared that the proceedings were in a Court, which had no jurisdiction but in cases of hostile capture, and a sentence of such Court, condemning a ship as prize, were produced in evidence, that would, as I conceive, be conclusive in our courts against a warranty of neutrality, whatever might be the grounds or reasons for such sentence; because it could not be taken that a Court so constituted could condemn upon any other ground, however erroneously they might act. But the title or description of a Court does not often point out the extent of its jurisdiction. In the case now under consideration, the Court is called the Tribunal of Commerce of the canton of *Nantz;* a title from whence it may be inferred that they had a jurisdiction much beyond questions of prize, which do not seem naturally to belong to a judicature of that description. Questions between merchants, and questions of revenue, seem more likely to be the object of its jurisdiction, than questions of hostile capture. But even if the court had been described as a Court of Admiralty, I do not know how our Courts could infer from thence that its jurisdiction was solely that of hostile capture, for in our own country the Court which has the sole jurisdiction of prize, and a Court of a very different jurisdiction are indifferently called, though not correctly, by that name. In order, therefore, for our municipal courts to judge of the grounds upon which a foreign

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Court condemns a ſhip from the conſtitution of the Court, the juriſdiction of that Court muſt appear either from the title or the proceedings, or be proved by evidence; if neither of theſe things happen, other *media* muſt be reſorted to to diſcover the foundation and ground of its determination, if that does not diſtinctly appear. In the courſe of the argument at your Lordſhips' bar, it was not denied by Mr. Attorney-General that the proceedings of a Court might be looked into to ſee whether a condemnation of a captured veſſel proceeded upon the ground of the breach of ſome revenue law, as ſmuggling; and if our municipal Courts may look into the ſentence to ſee whether the breach of a revenue law be the ground of condemnation, they, by a parity of reaſoning, may look into the proceedings to diſcover, as far as they may be able, whether the condemnation was on any ground not inconſiſtent with the warranty of neutrality; for the admiſſibility of a ſentence of condemnation in evidence, can only be contended for upon the ſuppoſition that it contradicts the truth of the warranty, which can only be when the ſhip is condemned, for ſome cauſe inconſiſtent with that warranty. The municipal Courts of this country, in examining whether or no foreign Courts have in their ſentences of condemnation proceeded according to the law of nations; have never ſo done with a view of deciding in a different manner where ſuch determination has not been conſiſtent with thoſe laws, than they would have done if in their opinion ſuch determination had had thoſe laws for its ſupport; for however repugnant to their ſenſe and reaſon ſuch ſentences have been, the municipal Courts of this country have ever felt themſelves bound by ſuch ſentences, whenever they could diſcover the point they expreſsly meant to decide. When that has not, as they have thought, been diſtinctly ſtated, and upon examining the reaſon of the ſentence, they have found a ſhip condemned on grounds inconſiſtent with the law of nations, they have been led to conclude that the condemnation has been for ſome other cauſe than that of enemies' property, and to refer it to other grounds to be collected from the proceedings, inaſmuch as a condemnation as hoſtile prize, according to their underſtanding of the ſubject, ought and could only juſtly proceed on the foot of thoſe laws; and though in their determination upon thoſe occaſions they may have drawn wrong concluſions, the principle upon which they have acted can hardly be controverted, which has been ſimply that of diſcovering whether or no

the warranty was or was not contradicted by the ſentence of condemnation. Until that is aſcertained, it is impoſſible to ſay whether any ſentence offered in evidence can have any and what relation or bearing on the queſtion in judicature. The caſe of *Bernardi* v. *Motteux* is the original authority upon which all the other caſes upon this ſubject have been founded. In that caſe the determination of a Court of Admiralty in *France* was held not concluſive againſt a warranty of neutrality. And there Lord *Mansfield* ſtated the difficulty to be, the not being able to collect the ground on which the *French* Court of Admiralty went, whether that of enemies' property or that of the papers being thrown overboard contrary to an *arrêt* of that country; and thinking that enough did not appear on the ſentence to aſcertain preciſely upon what it was founded, and that the *French* Admiralty might have proceeded on the ground of the papers being thrown overboard, determined in favour of the Plaintiff on the ambiguity of the ſentence. In that caſe Lord *Mansfield* was deſirous of the parties agreeing that the *procès* verbal ſhould be made a part of the caſe, becauſe by referring to it the ambiguity of the ſentence would be explained, as it ſet forth the ground of taking the ſhip to be an *arrêt* of *July* in the year 1778; and in the caſe of *Salloucci* v. *Woodmaſs*, *Park*, 362. Lord *Mansfield* laid it down as a general rule as to ſuch ſentences, that where no other cauſe appears, it muſt be preſumed from the condemnation that it proceeded on the ground of property belonging to an enemy; and diſtinguiſhed that caſe from *Bernardi* v. *Motteux*, as there a particular ground of confiſcation appeared on the face of the ſentence; and that it did not appear to be on the ground of enemies' property. That theſe deciſions have had great weight in the courts of common law will not be wondered at, if it be recollected that they had the authority of Lord *Mansfield*, whoſe mind when he filled the office of Solicitor General had been particularly turned to the conſideration of queſtions of prize, and who, according to the account of Sir *William Blackſtone*, (*Comm.* vol. 3. p. 70.) attended and conducted all the deciſions of the Cockpit during the whole of the war, which began in the year 1756, and whoſe maſterly acquaintance with the law of nations was known and revered by every ſtate of *Europe*. Subſequent to the deciſions I have mentioned, the caſes of *Geyer* v. *Aguilar*, *Chriſtie* v. *Secretan*, *Pollard* v. *Bell*, *Bird* v. *Appleton*, and *Price* v. *Bell*, have been decided, in which the Court has acted on the principles laid down in the caſes I have mentioned;

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tioned; and though in ſome of thoſe caſes expreſſions may have been uſed, from whence it may have been ſuppoſed that the Court has diſtinguiſhed between caſes, where the foreign ſentence has diſtinctly and directly founded their condemnation of a capture on its being enemies' property, and thoſe where it only was to be collected from other parts of the proceedings, that ſuch was the ground of deciſion, and that in ſuch latter caſe the Court did not hold itſelf bound unleſs it approved of the reaſons; yet I believe if the caſes are attended to, and that which has been ſaid by the different Judges is conſtrued with reference to the points in the caſes then before them, notwithſtanding ſome generality of expreſſion, it will not be found that they had any ſuch diſtinction in their minds; and if the opinions of all the Judges in thoſe caſes is attended to, it will not appear that the Court adopted any ſuch diſtinction. Having ſaid thus much as to the principles upon which the caſes have been decided, in which queſtions have ariſen on the effect of ſentences of foreign Courts by which ſhips have been condemned, it only remains to examine the ſentence in this caſe in order to ſee whether it has not profeſſed to condemn the ſhip *Catherine* as enemies' property; and if that is not diſtinctly ſtated to be the ground of the condemnation, whether that cannot be collected from other parts of the proceedings. And upon this point my opinion is, that the *Catherine* was condemned by the Tribunal of Commerce of *Nantz* for being the property of the enemies of the *French* Republic. That Court, after having laid out of their conſiderations various matters, which in their judgment ought not to weigh, and ſtating other things as the reaſons of their determination, the laſt of which is, "that conſidering every ſhip declared enemy and good prize carries with it the confiſcation of her cargo;" proceeds to declare the ſhip lawful prize; and as a conſequence adjudges the cargo to be lawful prize; that is, with reference to the laſt reaſon it judges the cargo prize, becauſe the ſhip had been declared an enemy; and then the ſentence concludes with reſpect both to the ſhip and cargo, that the whole, from what that Court has been pleaſed to conſider as an irregularity in the captain's papers, is to be deemed, that is, thought or judged to belong to the enemies of the *French* Republic; which terms, to my mind, moſt explicitly and diſtinctly mark the ground of condemnation to be that of enemies' property. This being ſo declared, any examination of the other parts of the proceedings, or the reaſons of the ſentence, cannot be gone into according

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ing to the principles of the ſeveral determinations in our Courts, which have never examined them but where they have been unable from the ambiguity of the adjudicating part of the ſentence to collect the ground on which it has been founded. For theſe reaſons, upon the points to which I have conceived your Lordſhips might expect me to advert, my opinion is, that the explanatory agreement or declaration does not ſhut out the effect of the ſentence of condemnation of the ſhip *Catherine*; and that the effect of that ſentence is concluſive in favour of the underwriters, that the warranty in the policy has not been complied with.

ROOKE, J. The queſtion propoſed by your Lordſhips ſuppoſes that the inſured have acted with perfect good faith; that the ſhip was truly an *American*, and had the uſual documents on board. At the time of the inſurance we muſt preſume that the inſured meant honeſtly, and that they believed that they could procure all the proper documents to prove the ſhip to be *American*. In the policy the *Catherine* is called an *American* ſhip. An agreement is afterwards entered into and ſigned by the underwriters to explain what they underſtood by the terms of the policy calling her an *American* ſhip. It is the agreement of the underwriters: it has their ſignature, and muſt be conſidered as expreſſed in their language, and conſequently if the expreſſion is in any reſpect equivocal, the conſtruction ought to be made favourably for the aſſured rather than for the underwriters. When this agreement was made, I muſt preſume (for I preſume that they have the common underſtanding of mercantile men) that the parties were aware, that in caſe of loſs by other perils than by capture or ſeizure, proof that the ſhip was properly documented according to all that was known in *America*, at the time when the ſhip ſailed, to have been required by *France* for that purpoſe, would be ſufficient to entitle the inſured to recover in our courts. They make no proviſion for loſſes by theſe means. They provide only for the events of capture or ſeizure. And in what terms do they provide? They do not ſay, in caſe of capture and condemnation we will not indemnify, for we ſhall conſider a ſentence of condemnation as concluſive to ſhew ſhe is not *American*. This would have put an end to all doubt. But knowing ſhe was liable to ſeizure or capture they declare, that in caſe of capture or ſeizure the aſſured before they claim for a loſs muſt produce proofs of the ſhip being an *American* bottom, and by bills of lading ſhew the tobacco to have been ſhipped upon account

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and risk of Messrs. *Henderson*, *Fergusson*, and *Gibson*, upon which the underwriters agree to settle by granting their bills at four months' date for the amount of their subscriptions, deducting the stipulated premium, in full dependance that the insured will use their best endeavours to recover the property, as for account of the shippers. The agreement is made with an express view to seizure or capture, and to these events only: it respects such seizure or capture as may afford an opportunity to the insured to endeavour to recover the property; and it supposes it possible that these endeavours may be unsuccessful; and no provision is made that the underwriters shall be excused, or that the assured shall refund in case these endeavours shall not procure a recovery of the property. It declares, however, that if the brokers produce proofs of the ship's being an *American* bottom, and shew by bills of lading that the tobacco was shipped on account and risk of the assured, that then the underwriters will settle. The mode of settlement is, I think, immaterial; whether by actual payment of money, or by granting bills at four months' date. The foundation of the claim of indemnity by the assured is the same, *viz.* that there has been a capture or seizure, and that proof has been produced that the ship is an *American* bottom. The whole doubt, then, arises on the construction of the word proof. Did the parties mean such proof as is satisfactory between man and man? such as was known, at the time the ship sailed, to have been required by *France* to shew her to be an *American* bottom? or did they mean such proof as, though technically conclusive in the *British* courts to shew her to have been condemned as enemies' property, yet is in reality contrary to truth and justice? They clearly have in their contemplation a case of capture or seizure, in consequence of which the assured may use their best endeavours to recover the property, and yet be unsuccessful. Now I cannot form to myself a case of seizure or capture in which the assured shall use their best endeavours to recover back the property, and be unsuccessful, except a case of condemnation. For if the ship should be seized and released, or taken and re-taken, the endeavours of the assured (if they used any) would be successful, and the indemnity would be of little importance; but if the ship should be seized and condemned, notwithstanding the endeavours of the assured, the assured would be entitled to recover as for a total loss. My opinion, therefore, is, that the agreement provides for the case of capture and condemnation, relying on the good faith of the assured

that they will honeſtly uſe their beſt endeavours to recover the property. If ſo, I can never aſſent to ſet up the ſentence of condemnation in bar of a performance of the agreement. That would be to allow an exception *ejuſdem rei cujus petitur diſſolutio:* it would be to pervert the agreement from what I conceive to be the true ſenſe of it; and to break through an eſtabliſhed maxim of our law. The conſtruction I put on the word "proof" is ſuch proof as is ſatisfactory between man and man without regard to the event of condemnation; ſuch proof as muſt have been produced in caſe the ſhip had been loſt by fire or perils of the ſea; in ſhort, ſuch proof as by the terms of the queſtion propoſed by your Lordſhips is admitted to have been produced by the parties in this cauſe. Having regard therefore to the agreement of the 20th *April* 1797, I am of opinion, that if bills had been given by the underwriters and had remained in the hands of the aſſured after the ſentence of condemnation, the aſſured could have recovered againſt the underwriters in actions brought on ſuch bills, after and notwithſtanding ſuch ſentence of condemnation. But if I ſhould be thought wrong in the conſtruction I put on the agreement, and if your Lordſhips ſhould be of opinion that the proofs required by the parties are ſtrict technically legal proofs, in which the ſentence of condemnation is to be included, then I am of opinion, upon the authority of the ſeveral adjudged caſes from *Cornelius* v. *Hughes*, in the time of *Charles* the 2d, to the preſent time, and particularly the laſt caſe of *Geyer* v. *Aguilar*, (which I think to have been decided on the ſoundeſt principles of policy) that the ſentence of condemnation once admitted in evidence is concluſive to ſhew that this ſhip was *pro hâc vice* enemies' property, and conſequently not a neutral *American*, as by the warranty the aſſured undertook ſhe ſhould be.

THOMPSON, B. The deſcription of the ſhip *Catherine* in the policy as an *American* ſhip, is equivalent to an expreſs warranty that ſhe was *American*, and the aſſured therefore are bound to ſhew that the ſhip really did ſuſtain the character of an *American* in every reſpect, and as ſuch was entitled to the privileges of neutrality before they can recover againſt the underwriters. Poſſibly the explanatory agreement was occaſioned by a doubt whether under the warranty the tobacco muſt not be proved to be the property of *Henderſon* and Co.; or poſſibly by a doubt whether the warranty was not confined to the ſhip. At any rate, I do not think that it was the intention of the underwriters to preclude any ſpecies of

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proof either on their own part or on the part of the assured. Indeed it is observable, that no precise mode of proof is pointed out with respect to the property of the ship, though the evidence of the property in the tobacco is admitted to be drawn from the bills of lading. It does not appear to me that the reliance placed by the underwriters on the endeavours of the assured to recover the property as for account of the shippers, imports any thing more than the common clause to the same effect introduced into every policy of assurance: consequently it affords no satisfactory inference as to the meaning of the explanatory agreement. Now unless it could be made clearly to appear that the underwriters had it in contemplation to renounce the advantage to be derived to themselves from any species of proof whatsoever, and more particularly from that species of proof which is conclusive in their favour, I think they ought not to be deprived of the use of the sentence of condemnation of which they wish to avail themselves. With respect to the effect of the sentence of condemnation, if the underwriters are at liberty to avail themselves of it, it appears to me that there is little difficulty. It is now clearly established, that where there is a warranty of neutral property, and a condemnation of the property insured takes place in a Court of competent jurisdiction as enemies' property, that such condemnation is conclusive against the warranty of neutrality in our Courts. The cases in which foreign sentences have been held not to be conclusive against the warranties of neutrality, have been cases where the foreign Courts have clearly proceeded in their condemnation on the ground of some contravention of their own arbitrary rules, and in which the terms of the sentences have not contradicted the warranty of neutrality. The *French* sentence by which the *Catherine* was condemned, expressly decides that she was not neutral property. This case therefore appears to me to fall precisely within the case of *Geyer* v. *Aguilar*, 7 *T. R.* 681. A doubt has been intimated whether if the underwriters had actually given their bills before the arrival of the sentence of condemnation, they would have been liable to pay those bills after the arrival of the sentence. Supposing the bills not to have passed into other hands, it appears to me that the underwriters would not have been liable to the assured upon those bills after the arrival of the sentence, for the bills would have been given under a mistake of facts falsified by the sentence, and consequently would have been without consideration.

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GROSE J. In anſwer to the queſtion put by your Lordſhips, Whether, under the circumſtances ſtated in the queſtion, regard being had to the legal meaning and effect of the ſaid policy, ſentence, and agreement of the 20th *April* 1797, the aſſured could have recovered againſt the underwriters in actions brought upon the ſaid bills? my humble opinion is that they might have ſo recovered. That opinion is founded upon the nature and legal effect of the tranſactions that have paſſed between the parties; and particularly the intent of thoſe parties apparent upon the face of the agreement. The tranſactions previous to and material to the conſideration of the agreement are, that in *March* 1797 the Reſpondents, merchants in *Glaſgow*, agents and attornies of Meſſrs. *Henderſon* and Co. merchants and partners in the State of *Virginia*, gave an order to Meſſrs. *Murdoch* and *M'Kenzie*, of *Glaſgow*, to make inſurance for Meſſrs. *Henderſon* and Co., citizens of the United States of *America*, on tobacco ſhipped on an *American* veſſel called the *Catherine*. A policy was effected, on the 8th *March* 1797, upon the goods and merchandiſes of and in the good ſhip or veſſel called the *Catherine*, an *American* veſſel, againſt the adventures and perils of the ſeas, and againſt men of war, enemies, pirates, takings at ſea, arreſts, and detentions of all kings, princes, and people. The voyage inſured was from the *Potomack* and *Patuxent* rivers to *Helvoetſluys*, from thence to *Rotterdam* or a port to the northward. Before the effecting this policy the ſhip ſailed with her cargo, on the 1ſt of *April*, from *Nottingham* in *Virginia*, and was captured in the voyage on the 17th of *May*, by a *French* privateer, and ſent into *France*. Between the date of the inſurance, and after the ſailing of the ſhip, and before the capture, *i. e.* on the 20th *April* 1797, doubts having ariſen how far, by the policy underwritten, there was a warranty of the property being *American*, and what was to be underſtood by ſuch warranty, the parties entered into the explanatory agreement, dated *Glaſgow*, 20th *April* 1797. Conſidering the terms of the agreement, the conſtruction of it may receive elucidation, and the intention of the parties be diſcovered, from the ſtate of things at that time exiſting in *Europe*, from the articles profeſſedly inſured, from the words uſed in the agreement, and from others that ſeem to have been ſtudiouſly omitted. Previous to the date of the policy and of this agreement a war had exiſted in *Europe* between this country and *France*, which made it convenient and deſirable to cauſe to be underwritten articles of different

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different ſorts, belonging as well to foreigners as to *Britiſh* ſubjects, againſt the perils of the ſeas, fire, and againſt capture at ſea, arreſts, and detainments of all kings, princes, and people, barratry, and all other perils, loſſes, and misfortunes, that had or ſhould come to the hurt, detriment, or damage of the goods or ſhip. Upon the inſurance of foreigners it became material to know whether they were neutral or enemies, and warranties were entered into for the purpoſe of binding down the aſſured to proof of their ſhips and goods being neutral, and in confidence that, ſhould they be ſuch, and ſeized or captured, the owners would, in caſe of proceſs by the captors in the Admiralty Courts praying condemnation, reſiſt and prevent their being condemned as prize. The law upon theſe warranties compelled the aſſured in all caſes to prove the warranty, and, whether the ſhip or cargo was loſt by capture, or the perils of the ſea, or fire, or barratry, if the warranty was not, as it is called, complied with, the aſſured, in caſe of a loſs, either by ſtorms or barratry, or capture, could not recover. And upon this ſubject, that is, warranty, there were different modes of proof; of the ſhip, by bills of ſale, or evidence by whom built; of the goods, by bills of lading, or of both by a ſentence of an Admiralty Court, to which, ſuch Courts being ſuppoſed to be guided by the law of nations, the *comitas gentium* pays ſuch reſpect as to deem its authority concluſive as to that which it determines as to the point of the property being neutral or hoſtile. And although, in my way of conſidering the queſtion, it is not neceſſary to ſay whether ſuch condemnation is concluſive, yet, as at preſent adviſed, I think it is; although I conſider proof of the ſhip being built in a neutral country, at the expence of the aſſured or of property conveyed by bill of ſale, to be a more ſatisfactory proof of the ownerſhip. The leſs ſatisfactory proof in the minds of honeſt men, in which the law ſays one thing and the real fact may be different, is proof on capture or ſeizure, by condemnation in an Admiralty Court; for it might happen that a ſhip, though neutral, though built by an *American*, loaded by an *American* with his own property, might be captured by a *French* ſhip, taken to a *French* port, libelled in a *French* Admiralty Court, and might be condemned as enemies' property, not becauſe it was enemies' property, but becauſe the owners had not complied with ſome *French* edict unknown to them, upon failure of which that nation deemed the ſhip to be enemies' property. Such things have notoriouſly happened; that they have ſo muſt

have been known to *Americans*, *Swedes*, *Danes*, and every foreign ſtate, whoſe ſhips the *Engliſh* have inſured, and the *French* nation have ſeized; condemnation, therefore, became an unſatisfactory, though concluſive, mode of proof of a ſhip and goods being enemies' property. I ſay unſatisfactory, compared with the proof of building the ſhip or bill of ſale, and of the bill of lading of the goods; but ſuch condemnation could ſeldom be, except where the loſs was by capture or ſeizure, not where it was by fire or ſtorm. Looking, therefore, to the different proofs of neutrality, and of being enemies' property, the parties in this caſe ſit down and recite a doubt exiſting, whether there was a warranty, and what was to be underſtood by it, and declare what, under certain circumſtances, ſhall conſtitute proof ſufficient of the warranty. They were aware of the different modes by which a loſs might happen, by perils of the ſea, by fire, by barratry, and by capture or ſeizure; but they ſtipulate what ſhall be proof of the warranty in two given caſes only, that is, capture or ſeizure; leaving, in other caſes, to the courts of law to determine what the proof ſhall be; and they declare, that in caſe of capture or ſeizure, *Henderſon* and Co., before they claim for a loſs, muſt produce proof of the ſhip being an *American* bottom (this relates to the ſhip); and by bills of lading ſhew that the tobacco ſhall have been ſhipped on account and riſk of *Henderſon* and Co. (which relates to the goods). This is the only ſtipulated proof as to the goods. Upon proofs then produced of the ſhip being *American* bottom, and bills of lading ſhewing that the tobacco had been ſhipped on account and riſk of *Henderſon* and Co., what is to be the conſequence? The agreement is expreſs; "upon which we ſhall ſettle by granting our bills at four months' date for the amount of our ſubſcription, deducting the ſtipulated premium," *i. e.* upon proof of the ſhip being *American* bottom by bill of ſale, or other proof of it having been built in *America*; of the goods having been ſhipped on account and riſk of *Henderſon* and Co. by bills of lading; the loſs was immediately to be ſettled by bills at four months, which might be immediately negotiated, and upon which the money ſtipulated might be raiſed, deducting the diſcount. Let us obſerve, then, what next follows: "in full dependence that the inſured will uſe their beſt endeavours to recover the property as for account of the ſhippers;" *i. e.* that for the benefit of the underwriters they will libel in the Admiralty Court for reſtitution, and prevent condemnation. So that, having the ſubject

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of condemnation in their view, and knowing what the effect and conſequence of the condemnation would be, they do not ſtipulate that upon condemnation as enemies' property the money ſhall be returned, but upon capture or ſeizure (leaving out in failure of condemnation) the bills are to be given, and the inſured, for the benefit of the underwriters, are to uſe their beſt endeavours to recover the property by preventing a condemnation. This ſeems to me to be the fair natural import of the words, and the intention was, that if the aſſured proved the ſhips to have been built in *America*, and the goods by bills of lading to have been ſhipped on the account and riſk of the inſured, the money was to be paid by bills, without any regard to a condemnation of any ſort. That a condemnation might be had was known; the conſequence of it was renounced; and, condemnation or no condemnation, the money was to be paid. *Cuilibet licet renuntiare juri pro ſe introducto.* If it had been the intention of the parties that in any caſe it ſhould be returned, the agreement would have ſo ſtipulated; but it has not that ſtipulation; and therefore it ſeems to me to be neither within the letter of the agreement nor the intention of the parties. For, had ſuch been the intention of the parties, when they ſtipulated what was to be done by each, and in ſuch ſtipulation manifeſtly having in view the poſſibility of condemnation, they would, nay, I think they muſt have added, "and if condemned as enemies' property, the money received to be returned to the underwriters." Upon theſe grounds, looking into the ſtate of things at the time of the agreement, reading the words of it in the plain, known ſenſe, adding nothing, leaving nothing out, it ſeems to me, under the circumſtances ſtated in the queſtion, that the aſſured have, on their parts, complied with the terms of the agreement, *i. e.* they have produced proof of the ſhip being an *American* bottom, and of the goods being ſhipped on account and riſk of *Henderſon* and Co.; and having ſo done, they are entitled to be paid by bills. And although thoſe bills remained in their hands until after the ſentence of condemnation, yet ſuch ſentence could not affect their right to the money, as ſuch right is made by the agreement to depend, not on condemnation of the property, but on ſtipulated proof of the ſhip being an *American* bottom, and the goods being ſhipped on account of *Henderſon* and Co.; which proof, by the queſtion, is admitted to have exiſted. The inference from theſe words, and this conſtruction, is, that when the underwriters underwrote the policy all that they

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expected the assured to warrant was, that the ship was *American* bottom, and the goods shipped on account of *Henderson* and Co.; of this, when they signed the agreement in question, they stipulate that the assured shall produce proofs, *viz.* as to the goods expressly by bills of lading (and this of the goods is the only stipulated proof, and thereby negatives all other proof and discussion upon it, and makes this proof conclusive); as to the ship's being *American* bottom, by any competent evidence; such evidence is admitted to have been given, because the fact which is the conclusion is expressly stated. On these grounds I am of opinion that the bills remaining in the hands of the assured after the sentence of condemnation, the assured, notwithstanding such sentence, would have had a right to recover the sums mentioned in those bills; and that the question put by your Lordships to the Judges, should be answered in the affirmative.

HEATH, J. The agreement of the 20th of *April* 1797, to which the question refers, is inaccurately drawn; yet I think that the intention of the parties is manifest, and I have no doubt concerning the legal construction of the instrument. The object of the parties was to ascertain the neutrality of the ship in the event of capture or seizure, by the medium of such proof as would be sufficient in the case of a loss by the perils of the seas. The manifest injustice practised by the *French* Courts of prize at the date of this agreement was so public and notorious, and was the subject of so many suits in this country, that I presume we may judicially take notice of it. If so, the meaning of the agreement, as clearly and manifestly may be collected from the terms of it, was to indemnify the assured against the iniquity of these sentences, and for the underwriters, in consideration of the high premium of 10 guineas *per cent.*, to take that risk on themselves; for the premium was a high war premium. But however clear this may be to my apprehension, yet as several other Judges entertain different sentiments on this subject, I shall proceed to examine the legal effect of this instrument, and to ascertain the principles which ought to govern the construction of it. In every executory contract where on a given event a sum of money is agreed to be paid by one party to the other party, it is competent to them to agree to ascertain such event by any certain medium of proof. The making such proof is a condition precedent in covenant, or a sufficient condition in *assumpsit* to entitle the party claiming the money to recover it. It was so decided in covenant in the case of *Wood* v. *Worsley*, 2 *H. Bl.*

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574. (a), where the certificate ſigned by the miniſter of the pariſh, by the churchwardens, and ſome of the moſt reſpectable inhabitants, was made neceſſary; for want of which the plaintiffs could not recover. It was ſo decided in *aſſumpſit* in the caſe of *Amic* v. *Andrews*, 1 *Mo.* 166., where the Defendant agreed, that if the Plaintiff would bring two witneſſes, who upon their oaths ſhould declare that the Defendant's father was indebted to the Plaintiff, and promiſed to pay, he the Defendant promiſed to pay the debt. It was held a good conſideration, and the Plaintiff on proving that he had adduced ſuch proof recovered. I am well aware that in the caſe laſt cited the queſtion turned on the conſideration; but that was the technical mode of determining the point; it was ſubſtantially the ſame as a condition precedent in covenant, and referable to the principle above ſtated. In the caſe of a valued policy, it is agreed that the production of the policy ſhall be proof of the value. The proof which ſhall be made in ſuch caſes as I have ſtated is concluſive to the other party, and not to be controverted but on the ground of fraud which violates every contract. Suppoſe an action of *aſſumpſit* brought on this agreement. It has been aſked, Whether, after the bills were given or the money paid, payment of the bills could be reſiſted or the money recovered on proof of the condemnation? I anſwer, by no means. The agreement is fair, the money is paid in purſuance of it, and there is no miſtake or fraud imputable. If this be admitted, then the bills are equivalent to payment. The time when the proof is to be adduced forms a material part of this agreement. The aſſured is entitled by the terms of it to recover his loſs, on producing proof before the final condemnation. By proof, the parties muſt mean ſuch as is required in the caſe of a loſs by the perils of the ſea. This is an anſwer to the argument uſed at the bar, that proof to be given on one ſide neceſſarily admits proof on the other ſide. A queſtion has been made and diſcuſſed, *viz.* What would have been the conſequence if the news of the capture and of the condemnation had arrived at the ſame moment? The fact ſuppoſed does not fall within the queſtion propoſed to us; it was not in the contemplation of the parties, and it does not fall within the ſcope of the agreement; for the agreement pre-ſuppoſes that at the time of making the proof and of delivering the bills there was a poſſibility of the ſhip being reſtored. It would be ſtrange to ſay, that proof means proof generally in reſpect to the ſhip, but

(a) 6 T. R. 710, ſame caſe in Error.

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proof by the bills of lading is to be reſtrained to the mere production of the inſtrument.

HOTHAM, B. The queſtion put to us by your Lordſhips ſeems to me to turn on the agreement ſtated of the 20th of *April* 1797, and the conſtruction that ought to be put upon it. Soon after the policy had been underwritten, to obviate ſome doubts that had ariſen on the terms of it, the agreement in queſtion was propoſed by the brokers, and was ſigned by the underwriters. To my apprehenſion it is clear that both parties intended to conſider the capture or ſeizure, if either ſhould happen, as a total loſs. But it was ſtipulated, that before the inſured were to claim for ſuch loſs, they ſhould be bound to produce proofs that the ſhip was an *American* bottom, and ſhew by bills of lading that the tobacco was really ſhipped on account and at the riſk of the inſured, upon which the underwriters engaged to ſettle by granting bills at four months' date. This agreement being thus entered into, it could not but be intended that it ſhould have ſo direct a reference to the policy itſelf, and be received as ſuch an explanation of it, that the two inſtruments ſhould be auxiliary to each other; both together expreſſing and producing the true meaning, underſtanding, and undertaking of the parties. Conſider then the inſtrument itſelf. There is nothing in the nature nor in the form of a policy that forbids the contracting parties from entering into any agreement that may more fully explain its true meaning and effect. It tends to no danger, it opens to no fraud. On the contrary, it conduces directly to juſtice by declaring what was really intended, though perhaps briefly and ambiguouſly expreſſed in the policy itſelf. What was the caſe here? The terms of the policy were thought, on conſideration, to leave the matter too looſe. Doubts were entertained on the future explanation of it. The warranty was not in litigation: before it was (and, indeed, that it might never be the cauſe of any), the brokers and the underwriters met, and came to a full and clear underſtanding of what they each undertook to do. The owners undertook that they ſhould produce proofs of the ſhip and goods being *American*. This was all that it was incumbent on them to do. On the other ſide the underwriters undertook, on the aſſured having done this, to ſettle with them by bills at four months. Have theſe things, then, reſpectively been done? The queſtion propoſed to us by your Lordſhips takes it as granted that the ſhip had every document on board to prove that ſhe was *American*,

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rican, and that the tobacco was alſo *American* property. The required proof, therefore, cannot but be taken as capable of being furniſhed to the underwriters. What was there then left for them to do? Nothing but to ſettle by granting bills at four months. Did the underwriters, when they ſigned the agreement, look to any thing elſe? Not a word was ſaid of any ſentence of condemnation: and yet it is impoſſible that they ſhould have overlooked ſuch an event; becauſe it is not to be imagined that any underwriters ſhould have been ſo ignorant of the ſtate of *Europe* at that time, as not to have foreſeen the probability of a capture or ſeizure; which, indeed, the agreement on the face of it points at as an event that was not improbable. If they had it not in their contemplation, it is, in my opinion, totally impoſſible to account for the expreſſion in the agreement, that the underwriters would grant bills for the amount of their ſubſcriptions, "in full dependance that the inſured would uſe their beſt endeavours to recover the property as for account of the ſhippers." Stronger words could not be uſed to denote what was then in the contemplation of both parties; namely, the event of a ſeizure or capture. With whom were the inſured to uſe their beſt endeavours to recover the property but againſt the ſeizing enemy? It is clear too by thoſe words that the underwriters were to pay after the capture, and before the ſhip was known to be condemned. It ſeems to me as if they meant altogether to avoid all conſideration of the effect of a foreign ſentence. In fact they were not to wait for any ſentence. It was not intended that they ſhould; for it was very poſſible that many months might have elapſed before any ſentence would be pronounced: whereas it was agreed that on proof being made the bills were at all events to be given at four months by the underwriters. If the proof produced ſatisfied them, then the door was to be ſhut from that moment againſt all further queſtions or litigations. The agreement ſeems to ſay, as explicitly as words can expreſs, that if a capture happen, let the event be what it may, let the ſhip be condemned or not, it ſhall matter nothing as between us, provided only the ſhip and goods are in truth *American*. Having made themſelves parties to this agreement, the underwriters can, neither in point of law, nor as honeſt men, reject that proof now, which by their own agreement they had ſtipulated to accept as ſatisfactory. On this ſhort ground my opinion reſts. I ſhall, therefore, add but a ſingle word on the other points that were principally re-

lied on in the argument; namely, firſt, that the contract ought to be deemed null and void from its dangerous policy. With reſpect to that I am of opinion that its political danger cannot authorize us as judges to pronounce it void. That is a conſideration that muſt reſt with the Legiſlature. With reſpect to the other important point, how far a foreign ſentence, under circumſtances like the preſent, ſhall, in a collateral queſtion between other parties, be concluſive in our courts, I need only ſay, in concurrence with ſo many of my Brethren, that ſuch a multitude of caſes have ſo ſettled the law on that ſubject, that it is now much too late to diſturb them. As a general propoſition, a foreign ſentence of condemnation, pronouncing ſhip and goods to be enemies' property, would be concluſive in our courts. But, conſtruing the agreement in the caſe before us as I do, as being expreſſive of the true intent and meaning of all the parties to it, my anſwer to the preſent queſtion propoſed to us by your Lordſhips, muſt be in the affirmative; notwithſtanding the foreign ſentence, which, but for the agreement in queſtion, would be concluſive evidence in our courts.

MACDONALD, Ch. B. The parties to this contract of indemnity having doubted whether the ſhip *Catherine* had been warranted neutral with ſufficient certainty, being merely denominated in the policy an *American* ſhip, and having alſo obſerved that there was not any warranty that the tobacco on board was the property of *Henderſon* and Co., and ſhipped on their account and at their riſk, came to a reſolution of reducing into writing the ſenſe in which this policy had been underſtood by all the parties to it. The explanatory writing which they entered into for that purpoſe ſtates, that as to two of the riſks, namely, capture and ſeizure, in order to ground a claim upon the underwriters it ſhall be neceſſary, with reſpect to the ſhip, to produce proofs generally of her being an *American* bottom; and, with reſpect to the tobacco, to ſhew that it had been ſhipped on account of *Henderſon* and Co., by producing ſpecifically the bills of lading, and bills of lading only. By this I underſtand them to declare that the aſſured were conſidered as having warranted the ſhip neutral, and now to warrant the goods to be the property of *Henderſon* and Co. Having thus declared what the warranty was and is to be, the explanatory paper proceeds to ſtate what was to be underſtood by ſuch warranty; this word, "underſtood," I conceive, from the context, to mean how that neutrality of the ſhip and property in the goods were to be verified

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verified to the underwriters, and what ſhould be the conſequence of its being verified in the manner agreed upon. With reſpect to the ſhip, no ſpecific documents are pointed out, as required, to prove her neutrality; they content themſelves with the general word proofs. With reſpect to the tobacco, they do ſpecify the requiſite evidence to be bills of lading. It has been contended at the bar, that with reſpect to the ſhip the word "proof" (which I conceive to mean the ſame as evidence in this paper), ſo far from excluding the evidence which might ariſe from a ſentence of condemnation, as negativing the warranty of neutrality, does, on the contrary, include the production of that evidence on the part of the underwriters. As to this the queſtion will be, Whether from the whole context of this paper it does not appear that the word "proofs" was uſed by the parties in a more confined ſenſe; which, to me, appears to have been the caſe. It ſeems to have been the intention of theſe parties, that at the ſame time that the property in the tobacco might be ſhewn to be that of *Henderſon* and Co. by the production of bills of lading, the neutrality of the ſhip ſhould be ſhewn by proofs or evidence. Now the property in the goods might be ſhewn by production of the bills of lading on the part of the aſſured before they claimed as for a loſs, and upon ſuch production the underwriters undertook to ſettle. This expreſſion imports that they would conſider that evidence as concluſive, inaſmuch as undertaking to ſettle means undertaking to pay. When the bills of lading were thus to be produced, and a claim made, it might well have happened that no ſentence of condemnation had been pronounced, nor, if pronounced, been heard of; yet they undertake to ſettle or pay. Such is the evidence on which the underwriters ſtipulate to pay with reſpect to the tobacco. In like manner, as the documents which were to be produced, grounding the claim of indemnity for the capture of the tobacco, might have been exhibited to the underwriters before a ſentence of condemnation was pronounced, or known to have been pronounced, ſo might the proofs of the neutrality of the ſhip. Theſe latter proofs muſt, therefore, mean ſuch evidence as the aſſured had it in their power to produce before a ſentence of condemnation had been pronounced, or was known to exiſt; namely, all ſuch as *American* neutral ſhips muſt have on board according to the general law of nations, or ſpecial treaties with *France*. The evidence, then, ſpecifically agreed upon, as grounding a claim of indemnity with reſpect

ſpect to the goods, was ſolely that which would prove the fact of their having been ſhipped on account and at the riſk of neutral owners, and no future time was looked to by the parties, nor any future event which might afford conſtructive evidence, proving them not to be the goods of neutrals. The proofs, then, which were in contemplation of the parties to this explanatory paper, muſt have been ſuch, with reſpect to the ſhip as well as the goods, as the aſſured could produce if they had claimed before a ſentence condemning the ſhip was known to exiſt; namely, thoſe with which your Lordſhips' queſtion directs us to aſſume in argument, this ſhip to have been furniſhed to prove her neutrality in the fulleſt extent independent of a ſentence of condemnation. Parties who are explaining their own meaning in a policy of aſſurance cannot be ſuppoſed to be ignorant of the courſe of proceeding in the event of capture; they muſt know that the caſe of a captured ſhip muſt be ſubmitted to a tribunal profeſſing to adminiſter the law of nations in the country of the capturing ſhip, and that a ſentence of condemnation might be pronounced. In the preſent caſe, it appears that they had this event directly in their view; for the agreement ſtipulates that the underwriters will ſettle, in full dependence that the inſured will uſe their beſt endeavours to recover the property as for account of the ſhippers; and the only riſks ſtated in the agreement are capture and ſeizure. This muſt mean after capture and while the ſuit was depending; for, after ſentence pronounced and affirmed, that the ſhip and cargo were to be deemed the ſhip and goods of enemies, every expectation of ſucceſsful endeavours to recover the goods muſt have been in vain. This ſeems to indicate that the true meaning of the parties was, to conſider the capture or ſeizure as a total loſs between themſelves, for which the aſſured ſhould be indemnified upon the underwriters' being furniſhed with thoſe documents of neutrality, without which ſhips cannot profit by their neutrality, and bills of lading ſhewing the property in the tobacco to be that of the perſons named in the policy. This further appears from the mode in which the ſettlement or payment was to be made; and it ſhould ſeem that it was to take place immediately upon the requiſite production being made. Payment was agreed to be made by the underwriters giving negotiable ſecurities, to the amount of their ſubſcriptions, to the aſſured,

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at four months' date. The ſentence of condemnation might not have taken place till after the expiration of the four months, or the time when the bills were negotiated. If the underwriters had any reſerved reliance on the effect of a future ſentence of condemnation making its appearance, they muſt be ſuppoſed to have intended to expoſe themſelves to all the difficulties which would have ariſen had thoſe bills been actually given and ſent into circulation. The *bonâ fide* holder, by indorſement of the aſſured when the bills were due, would have had a right to recover upon them. The underwriters muſt then have had recourſe to the aſſured, to whom they gave thoſe bills in their own wrong, offering a return of premium. It is difficult to imagine the parties to this explanatory paper could intend to expoſe themſelves to thoſe difficulties into which their agreement might have brought them. The undertaking to give negotiable ſecurities ſeems inconſiſtent with any other motive than the final adjuſtment of the claims of theſe parties, the one upon the other, except the poſtponed payment. The parties have made a law for themſelves, by which they muſt abide; and that law has been conformed to on the part of the aſſured. With reſpect to the effect of thoſe unjuſt ſentences of the foreign tribunals, although I might have heſitated in concurring with ſome of the caſes, it is now too late to encourage any doubts, as they have been acted upon to a very great amount.

After the learned Judges had thus delivered their opinions, the Lord Chancellor (Lord ELDON) ſpoke to the following effect:

In the opinion which I ſhall now deliver to the Houſe upon this caſe, I am enabled to ſtate that I have the concurrence of Lord *Ellenborough* (*a*), who is prevented from perſonally expreſſing the ſame by the duties of his office. When this caſe firſt came before the Houſe, many doubts were ſuggeſted, not only from the peculiar circumſtances of the policy in queſtion, connected as it is with the writing annexed, and whether the deciſion of the Houſe ought or ought not to be governed by that declaratory agreement, but alſo as to the true conſtruction of the *French* ſentence of condemnation, and how far in ſuits of this kind ſuch ſentences are at all admiſſible in evidence. Taking all theſe points into their conſideration, the

(*a*) His Lordſhip was ſitting at *Guildhall*.

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Houſe deemed it right to ſummon the learned Judges to their aſſiſtance. After the opinions delivered by the learned Judges little need be ſaid on the admiſſibility and effect of foreign ſentences condemning on the ground of the property belonging to an enemy. The practice of receiving thoſe ſentences as concluſive evidence for collateral purpoſes, and not merely in ſuits between the identical parties in the foreign courts, may poſſibly have firſt obtained in thoſe caſes where the Plaintiff himſelf produced the ſentence in order to prove the loſs; and I have reaſon to believe that the practice of allowing the underwriters to make uſe of them was founded on a notion, that every man might come into a Court of Admiralty *pro intereſſe ſuo*, and that all mankind, therefore, were virtually parties to ſuch proceedings. That notion, I apprehend and am informed, is a miſtaken notion, and that the aſſured in a policy of aſſurance, with a warranty of neutral character, could not be admitted parties to the proceedings in a Court of Admiralty for ſuch collateral purpoſes as thoſe for which they muſt of courſe claim to be admitted. It does not become me, however, for that reaſon, now to impugn a practice acted upon for ſo long a ſeries of years, and that by men whoſe judicial character muſt ever be looked up to with reverence in this country. I well know alſo, how much property has been affected by this principle, and how much more may now be afloat on the faith of that long train of deciſions in *Weſtminſter-Hall*, by which the principle in queſtion has been ſanctioned. There is, indeed, another claſs of caſes ariſing out of foreign ſentences, in which the conduct of the *French* Courts, regulated as it has been by the ordinances of that country, has met with no ſmall degree of reprobation, and where the Judges of our Courts have held, that unleſs the adjudication by which the property in queſtion is condemned be expreſsly declared to proceed on the ground of the property belonging to enemies, they are at liberty to examine the propriety of ſuch ſentence. Of that claſs of caſes I will only ſay, that they have not yet, from their antiquity, acquired that ſtability which can operate to preclude us from fully examining the principles upon which they have proceeded. In the event of ſuch examination taking place, the queſtion would be, Whether ſuch ſentences of condemnation muſt not be preſumed to

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have been founded on the only legitimate ground on which they can be founded, *viz.* the property not being neutral but hoſtile? and, Whether we are ever at liberty to ſay that the deciſions of theſe Courts are not conſiſtent with the law of nations? I think I ſhould feel myſelf under great difficulty, if called upon, to admit the authority of ſome of the deciſions upon theſe ſentences. In the preſent caſe, giving effect to the explanatory agreement, and conſidering it as part of the contract, it ſeems to me impoſſible to contend that the underwriters undertook to receive proofs of the property being *American* only in caſe it was not condemned as hoſtile by a *French* Court, or that the aſſured undertook that no ſuch event ſhould happen. The intention of the parties ſeems to have been to explain themſelves in this way, *viz.* that if there was a warranty of *American* property in the policy, yet that it ſhould not be ſo conſtrued as to preclude the aſſured, in caſe of a loſs, from proving the ſhip and property to be *American*, even though a *French* ſentence ſhould condemn them as not being *American*. If this be not the legal effect of the agreement, I have not as yet been able to learn what effect the agreement is to have. Conſidering that in caſe of capture, that capture might either be followed by condemnation or acquittal, the underwriters agree that, without regard to the conſequences of that event, they will, on the proofs alluded to being produced, pay within a definite period. Thoſe proofs are to ſatisfy the underwriters of two points, *viz.* that the ſhip was an *American* bottom, and that the cargo was ſhipped on account and riſk of Meſſrs. *Henderſon*, *Ferguſſon*, and *Gibſon*. It is obſervable alſo, that on the latter point the only proof required was the bills of lading; whereas, if the aſſured are, notwithſtanding that agreement, to remain under all the legal difficulties to which they would have been expoſed if no ſuch agreement had been entered into, we muſt recollect that the bills of lading, if objected to, would not at law be proof of the fact, which, under this agreement, they are brought forward to eſtabliſh. We muſt ſuppoſe the parties to have been aware that the mere act of capture might or might not entitle the aſſured to recover, according as the property ſhould be treated in the *French* Court of Admiralty; notwithſtanding which the underwriters agree to pay; without abiding the judgment of the *French* Court upon the queſtion, Whether the property was *American* or not?

not? The explanatory agreement, therefore, appears to me to contemplate an adjuſtment not ſubject to the ſame conſequences to which every other adjuſtment is ſubject; and, I will add, that if the news of the capture had been accompanied by the very ſentence on which the underwriters now reſt their defence, I think they muſt, nevertheleſs, have paid the loſs. If the Houſe ſhould adopt this courſe of reaſoning, it will be unneceſſary to decide the other points agitated in this caſe.

Lord ALVANLEY (Ch. J. of the Common Pleas). After the long ſeries of caſes in *Weſtminſter-Hall*, in which foreign ſentences have been received for the ſame purpoſes for which the *French* ſentence in this caſe is now ſet up, and the long period of time during which thoſe caſes have been acted on by the commercial part of this country, and acquieſced in by the legal part of the community, I cannot admit that it is ſtill open to this Houſe to decide that foreign ſentences are not admiſſible evidence in ſuits between the aſſured and the underwriters, in order to falſify the warranty of neutrality. Nor do I feel that opinion ſhaken by the conſideration that the point has never yet received the expreſs deciſion of this Houſe. At this late period, ſuch a deciſion upon that point as the Reſpondents now contend for, might almoſt induce the merchants of *London* to ſhut the doors of *Guildhall* againſt the Judges. It gives me, therefore, great ſatisfaction to find, that on this point there is no difference of opinion entertained. Nor has any perſon a right to complain. It being once known that ſuch is the law reſpecting foreign ſentences, thoſe who do not chooſe to ſubject themſelves to the caprice of a *French* Court may ſtipulate in the policy that the ſentence of a *French* Court ſhall not be adduced in evidence againſt their claim. When this caſe was firſt argued, I entertained conſiderable doubts reſpecting the effect to be given to the explanatory agreement; and I could not at that time bring myſelf to think that the aſſured were thereby relieved from the difficulty in which they would otherwiſe be placed by the *French* ſentence of condemnation. I now concur entirely with my Lord Chancellor and thoſe of the Judges who think that on that agreement alone the preſent caſe may be decided. The law is now perfectly clear, that a warranty of *American* ſhip includes in it a warranty of the ſhip having on board

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every document with which an *American* ſhip ought to be furniſhed. It ſeems as if the parties to the policy effected by the Reſpondents were not aware of this circumſtance when the policy was effected, and therefore they afterwards procured the explanatory agreement from the Appellants. Such appears to me the true conſtruction of that agreement. On the conſtruction of foreign ſentences much uncertainty has prevailed in our Courts; but the doctrine laid down in the caſe of *Kindersley* v. *Chaſe* appears to me beſt calculated to do away that uncertainty.

The Houſe, on the motion of the Lord Chancellor, affirmed the Interlocutors of the Lord Ordinary and the Court of Seſſion.

END OF TRINITY TERM.

CASES

ARGUED and DETERMINED IN THE

Court of COMMON PLEAS,

IN

Michaelmas Term,

In the Forty-fourth Year of the Reign of GEORGE III.

TAYLOR *v.* HARRIS.

Nov. 7th

If a Defendant die on the night before the trial of a cauſe at the Sittings in term, a verdict obtained in ſuch cauſe, and the judgment entered up thereon, will be ſet aſide upon application to the Court.

IN this caſe notice of trial having been given for the firſt Sittings at *Weſtminſter* in laſt *Eaſter* term, was afterwards countermanded to the ſecond Sittings in the ſame term, which was on the 6th of *May*. The Defendant died at eleven o'clock at night on the 5th of *May*. On the 6th the cauſe was called on, and a verdict paſſed for the Plaintiff, upon which verdict judgment was afterwards ſigned; but before the ſigning thereof notice of the Defendant's death was given by the Defendant's attorney.

A rule *niſi* having been obtained on a former day for ſetting aſide this judgment,

Beſt Serjt. ſhewed cauſe. Had this been the caſe of a trial at *niſi prius*, it could not have been diſputed that a verdict, taken after the death of the party, unleſs that death happened before the firſt day of the Sittings, would be good. Indeed that preciſe point was decided in *Jacobs* v. *Miniconi*, 7 *T. R.* 31. It remains then to be conſidered how far Sittings in term differ from Sittings at *niſi prius*. Now it may be obſerved, that the day of the Sittings in term is part

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of the term, and as such is referable to the first day of the term. The Defendant therefore, in this case, not having died until after the first day in term, the judgment is regular.

Lord ALVANLEY Ch. J. With respect to the case of *Jacobs* v. *Miniconi*, it is to be remembered that the cause there might have been tried at any period after it had once been entered in the Judge's cause paper: and nothing but the multiplicity of business prevented it from being tried on the first day of the Sittings. But the Sittings in term neither commence with the term, nor are any part of the term; they are appointed at the discretion of the Chief Justice; and if a cause, from never having been entered in the cause paper, could not possibly have been tried until after the death of the Defendant, a verdict obtained after his death cannot stand. Indeed the *postea* is made up as of the very day on which the cause was tried, whereas in the case of trials after term the *postea* is made up as of the first day of the Sittings.

ROOKE and CHAMBRE Js. concurring,

Rule absolute.

Nov. 19th.

PILLOP *v.* SEXTON.

A lunatic may be brought up by *habeas corpus* from *St. Luke's* Hospital to be surrendered in discharge of his bail.

CLAYTON Serjt. having on a former day obtained an *habeas corpus* directed to the keeper of *Saint Luke's* Hospital, ordering him to bring up a lunatic for the purpose of being rendered in discharge of his bail, he on this day mentioned, that in obedience to the *habeas corpus*, the keeper of the hospital attended with the lunatic, and also the warden of the *Fleet*, to take him into custody.

Accordingly the lunatic was brought into court, and surrendered into the custody of the warden of the *Fleet* (*a*).

(*a*) Vide *Steel* v. *Allan*, ante, vol. 2. p. 362. and p. 437. with the cases there cited.

6th.

SMITH *v.* YOUNGER.

In an affidavit to hold to bail the addition of "manufacturer" to the Deponent's name is sufficient.

IN an affidavit to hold to bail, the Deponent described himself as *James Smith* of *Wapping* in the county of *Middlesex*, manufacturer.

Lens Serjt. now moved for a rule to shew cause why a common appearance should not be entered, on the ground of the insufficiency

ciency of this deſcription, contending that the addition of manufacturer was too vague, and would vitiate either an indictment or an original writ.

But *The Court* thought the addition ſufficient in an affidavit to hold to bail.

Lens took nothing by his motion.

OSBORN *v.* GOUGH.

Nov. 26th

A notice of action to a magiſtrate under 24 G. 2. *c.* 44. *ſ.* 1. indorſed with the name of the Plaintiff's attorney, and the words "of *Birmingham*" as deſcribing the place of his abode, held ſufficient.

THIS was an action brought againſt the Defendant as a magiſtrate of the county of *Stafford*, for maliciouſly refuſing to accept ſureties for the Defendant's appearance at the Quarter Seſſions to anſwer to a charge of a miſdemeanor. At the trial before *Lawrence* J. at the laſt Aſſizes for the county of *Stafford*, a preliminary objection was taken to the notice of action delivered to the Defendant under the 24 *Geo.* 2. *c.* 44. *ſ.* 1. as not deſcribing with ſufficient particularity the reſidence of the attorney, which by that act is required to be indorſed on the notice. The deſcription was "*William Spurrier* of *Birmingham* in the county of *Warwick*, attorney for the within-named *William Gough*." The learned Judge refuſed to nonſuit the Plaintiff, and the cauſe having proceeded, a verdict was found for the Plaintiff, with 500*l.* damages.

A rule *niſi* having been obtained upon a former day for ſetting aſide this verdict on the ground of the objection taken at the trial,

Shepherd and *Onſlow* Serjts. now ſhewed cauſe; and in the firſt place produced an affidavit, the object of which was to ſhew that the reſidence of *Spurrier* was well known both to the Defendant and his attorney before the commencement of the action. They then contended, that the notice was ſufficiently particular according both to the ſpirit and letter of the act, the words of which are, "on the back of which notice ſhall be indorſed the name of ſuch "attorney or agent, together with the place of his abode." They admitted that *Middleſex* or *London* would be an inſufficient deſcription of the reſidence of an attorney, becauſe under thoſe names are compriſed many diſtricts; whereas in *Birmingham* there was but one pariſh, although there were many ſtreets; and they urged that a letter addreſſed to him by the deſcription in the notice would undoubtedly have found him. They obſerved, that a caſe of *Fergusſon* v. *Addington*, which had been mentioned to Mr.

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Juſtice *Lawrence* at the trial in ſupport of the objection, had been incorrectly ſtated; for the notice to the Defendant there, who was ſued as a magiſtrate, was ſaid to have been indorſed with the names of the Plaintiffs' attornies, and "*Eſſex-ſtreet*," as the place of their reſidence, which Lord *Kenyon* held to be an inſufficient notice; whereas in truth the notice was only indorſed with the names of the attornies, and no place of reſidence whatſoever was added. They relied on the caſe of *Wood and Others* v. *Folliott* (*a*), T. 26 *Geo.*

(*a*) *Wood and Others* v. *Folliott*, C. B. Tr. 1786.—Motion for a new trial in an action againſt officers of exciſe for ſeizing a veſſel belonging to the Plaintiff. By 23 G. 3. c 70. ſ. 30. no writ ſhall be ſued againſt, nor a copy of any proceſs ſerved upon, any officer of exciſe or perſon acting by his order, or in his aid, for any thing done in execution of their office, until one calendar month next after notice in writing ſhall have been delivered to him, or left at the uſual place of his abode, by the attorney or agent for the party who intends to ſue, &c. in which ſhall be clearly and explicitly contained the cauſe of action, the name and place of abode of the perſon who is to bring ſuch action, and the name and place of abode of the ſaid attorney or agent.

The notice given in this caſe was as follows: "To Mr. *Dan. Folliott*, commander of His Majeſty's cutter *Baracuta*. You having lately ſeized and taken a certain ſloop or veſſel called the *Antigua Packet*, the property of *Wm. Wood* of *Rotherhithe*, in the county of *Surry*, merchant, *Alexander Wood*, late of the ſame place, mariner, and *Oſborn Deverſon*, late of the ſame place, mariner, together with her cargo, &c.

"*Donne* and *Cox*, *Furnival's Inn*, attorney "for the ſaid *W. W.*, *A. W.*, and *O. D.*"

This cauſe was tried at the laſt Spring Aſſizes at *Launceſton*, before Mr. Baron *Hotham*, who was of opinion that the notice was inſufficient.

Mr. Serjt. *Rooke*, in ſupport of the nonſuit, ſaid, that this was a joint action by ſeveral, and one only is deſcribed at all. The reaſon of requiring a notice is, that Defendant may have an opportunity of tendering amends. If any one had releaſed, it would have done. The notice here is inſufficient as to any of the Plaintiffs. Though the Court ſhould hold the deſcription of the firſt to be ſufficient, yet that of the others is clearly bad. The firſt is of *Rotherhithe* in the county of *Surry*. I have an affidavit, ſtating that there are 16 ſtreets in *Rotherhithe*. It is no more than ſaying of *York*. Notice of bail ſo deſcribed would be bad. As to the others, "late of *Rotherhithe*" is no deſcription at all of the party's place of abode. This laſt deſcription is copied from the ſtatute of Additions, which requires the addition to be "of where they be, or were reſident." This caſe is not new. On 24 *G.* 2. *c.* 44. a notice to juſtices is required before any action can be brought againſt them. In *Strickland* v. *Ward*, at *Winton*, before Mr. J. *Yates*, the action was aſſault and falſe impriſonment, for committing a man returning to the pariſh from whence he had removed. The notice was of an action on the caſe, whereas the action brought was treſpaſs *vi et armis*. Mr. J. *Yates* held the notice inſufficient, and not conformable to the words of the ſtatute. He would preſume the Juſtice acted well till the contrary was proved; and he could not blame a juſtice who, knowing himſelf to be troubled with an unjuſt action, ſhould lay hold of this or any other trifling advantage to nonſuit a Plaintiff. He alſo cited *Taylor* and *Fenwick*, *B. R. M.* 1782. In the preſent caſe, the truth is, that one of the Plaintiffs lived at *Newington*, and the Defendant could not find the others.

Mr. Serjt. *Groſe*, in ſupport of the rule. He mentioned the caſe of *Strickland* and *Ward*, on which Lord *Loughborough* ſaid, would it not have been enough to have ſaid "an action," and was not the reſt ſurpluſage? [*Gould* J. All that the ſtatute ſays is—the cauſe of action.] Mr. Serjt. *Groſe*. They might

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26 *Geo.* 3. in this Court, and obſerved that the caſe of *Taylor* v. *Fenwick* (*a*), cited 7 *T. R.* 635., was perfectly diſtinguiſhable from the preſent, the notice in that caſe having been ſigned by the attorney thus, "Given under my hand at *Durham*," which conveyed no intelligence of his place of reſidence.

Williams and *Lens* Serjts. in ſupport of the rule obſerved, that the ſtat. 24 *Geo.* 2. *c.* 44. had been very rigidly conſtrued by the courts, as appeared from the caſe of *Lovelace* v. *Curry*, 7 *T. R.* 631. where it was determined that it was not ſufficient to ſtate the cauſe of action in the notice without ſpecifying what particular writ or proceſs was intended to be ſued out; that if a particular deſcription of the attorney's reſidence was required by the act of parliament, it was no anſwer to the objection to ſay that his reſidence was known; that the town of *Birmingham* was a place of great magnitude, containing a variety of ſtreets, and 60,000 inhabitants; and that the object of the ſtatute was to enable the Defendant, without difficulty or loſs of time, to find out the attorney and tender amends, and

as well have objected to the number of the ſtair-caſe in *Furnival's Inn* not being mentioned, where the attorney lives.

Lord *Loughborough* C. J. I think the notice is ſufficient, and that it anſwers all the purpoſes of the act. The intent of it was that the party ſhould have an opportunity of tendering amends. This is an action by partners. The deſcription of the firſt is fully ſufficient. A letter by the poſt would have found them; ſo would a porter. The caſe of bail is different, on account of the time the Plaintiff has to inquire. I do not think that either of the caſes cited apply, ſuppoſing them to be well decided. As to the ſecond objection, if the notice is not ſufficient, a houſe of trade with partners abroad could bring no action.

Gould J. I am of the ſame opinion; it only requires reaſonable information. The caſe of bail is the eſtabliſhed practice of the Court. This act requires two different modes of information; the reſidence of the attorney and the Plaintiffs.

Heath J. I think the notice is ſufficiently clear and explicit within the meaning of the act. Rule abſolute.

(*a*) *M.* 23 *Geo.* 3. *Taylor and Fenwick*, *B. R.* tried at *Durham*.

This was an action againſt a juſtice of the peace, founded on a warrant granted by the Defendant on a conviction under the militia act.

At the trial it was objected that the notice was inſufficient, for that the ſtatute of 24 *G.* 2. *c.* 44. *ſ.* 1. requires that the attorney or agent's name muſt be indorſed on the back of it, together with the place of his abode. The notice in the preſent caſe concluded thus: "Given under my hand at *Durham*, the 11th day of, *&c.* *Richard Ratcliffe*, attorney for, *&c.*"

Mr. *Wallace* ſaid, the reaſon of the act requiring this was that the party might make a tender of amends. The act does not require it to be ſigned by the attorney. If he had indorſed it "*Richard Ratcliffe*, attorney at *Durham*," it would have done. This was no more than ſaying he ſigned it at *Durham*, and was no communication of *Durham* being his place of abode. [The real fact was that he was a lodger at *Durham*.]

Lord *Mansfield*. The truth of it is this; in favour of juſtices of the peace the legiſlature has thought fit to preſcribe a preciſe form. Whether right or not it does not matter. This notice does not tell you the place of abode. In words he muſt tell you his place of abode.

Willes, *Aſhhurſt*, and *Buller*, Juſtices, were of the ſame opinion. Nonſuit entered.

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that it was therefore no ſufficient anſwer to ſay, that the reſidence might be found according to the deſcription and by a reference to the poſt-office. They contended, that although *Rotherhithe* was held to be a ſufficient deſcription in the caſe of *Wood* v. *Folliott*, it by no means followed that *Birmingham*, which is a much larger and more populous place, is ſufficient in the preſent inſtance; beſides which, ſome ſtreſs appeared to have been laid in that caſe on the circumſtance of the place deſcribed being the ſituation of a houſe of trade, which is a matter of greater notoriety than the office of an attorney; and that the caſe of *Taylor* v. *Fenwick* was not cited as in point, but merely to ſhew how ſtrict a conſtruction had been put by the Courts upon notices under the 24 *Geo.* 2. *c.* 44.

Lord ALVANLEY Ch. J. The 24 *Geo.* 2. was framed for the protection of magiſtrates againſt whom actions ſhould be brought for any thing done by them under colour of their offices; but I have no difficulty in ſaying, that the preſent Defendant has had the protection which the ſtatute was intended to afford to perſons in his ſituation; for the notice which has been given would certainly have enabled him to avail himſelf of all the benefits conferred by the act. The act certainly requires not only that the name of the Plaintiff's attorney, but the place of his abode ſhould be indorſed on the notice. Here it is objected that the words "of *Birmingham*" are not a ſufficient deſcription of the attorney's place of abode, on account of the extent of the town of *Birmingham*. The interpretation which I put upon the ſtatute is this, that if the place indorſed upon the notice be the true place of the attorney's abode, it lies on the defendant to ſhew that ſuch deſcription has not afforded him the opportunity of taking advantage of the act of parliament. In this caſe no evidence has been offered to ſhew that *Wm. Spurrier* could not have been found, if reaſonable diligence had been uſed. It is admitted that the caſe of *Taylor* v. *Fenwick* did not decide the point now in diſpute; for the objection there was not that the place of abode was inſufficiently deſcribed, but that nothing was ſtated but merely the place at which the notice was ſigned. The other two caſes appear to me to be in favour of the Plaintiff. That of *Wood* v. *Folliott* is extremely ſtrong. The exciſe laws require that the place of abode both of the Plaintiff and his attorney ſhall be ſtated in the notice; and the Plaintiffs in that caſe being three partners, one of them

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was described as of the place where the business was carried on, and the others as "late" of the same place; yet the Court held the description sufficient. In that case the Court were equally called upon to take notice that *Rotherhithe* was a large place, as we are called upon to take notice that *Birmingham* is a large place. This notice has been compared to a notice of bail; but it differs in this, that a notice of bail is regulated by the peculiar practice of the Court; and being only a two days' notice, must necessarily be very accurate, or the time of inquiry will be elapsed before the bail are found. As the Defendant in this case does not appear to have been put under any difficulty in consequence of the generality of the notice, I think we ought not to grant a new trial.

ROOKE J. I am of the same opinion. The statute only requires such information to be given as will enable a Defendant to tender amends; but it does not require such information as precludes the necessity of all inquiry. Suppose the street were stated, but not the number of the house; in that case some inquiry must be made. *Primâ facie* this notice appears to me to be sufficient; if the Defendant had experienced any difficulty from the size of the town, or the number of persons of the same name living in it, that fact might have been shewn. I agree with my Lord, that the notice required by the statute is not like a notice of bail; for unless the description in the latter be extremely accurate, the time for inquiry after the bail, which is very short, may be consumed before they are discovered. But in this case a whole month is given for tendering amends before the Plaintiff can commence his action.

CHAMBRE J. I entirely agree with the rest of the Court. The case of bail does not appear to me to bear any analogy to the present. The persons respecting whom notices are to be given in cases of bail, are often in obscure situations, and the time allowed for finding them out, and inquiring into their character and sufficiency, is no more than two days. But in the case of notices under the statute a month is allowed for finding out the attorney before an action can be brought, and the persons to whom the notice relates are the officers of the public courts of justice. I agree, indeed, that the description ought not to be quite vague; perhaps such a place ought to be stated as may be sufficient for a venue. But where such a description as the present is given no difficulty can arise. The attorney might easily have been found by applica-

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tion to the poſt-office. The true rule ſeems to me to be, that ſuch reaſonable notice ought to be given as will enable the Defendant to make a tender.

Rule diſcharged.

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If the Defendant pay money into court generally, upon a declaration containing a count on a policy of inſurance, together with the money counts, and it appears that the Plaintiff by his conduct previous to the trial induced the Defendant to believe that the only point to be tried was a queſtion of fraud, and ſuffered him to prepare his evidence accordingly, the Court will not allow the Plaintiff to object to the receipt of that evidence at the trial, on the ground of the contract having been admitted by payment of money into court.

In *C. B.* if the Plaintiff proceed to trial after money paid into court, he is notwithſtanding entitled to coſts up to the time of the money being paid in.

If the rule of court for the examination of witneſſes by commiſſion expreſs that the depoſitions of witneſſes at *Hamburgh* and *Lubeck* are to be taken, and the commiſſion is directed to perſons at *Hamburgh*, the expences of bringing witneſſes from *Lubeck* to *Hamburgh* ought to be allowed upon taxation.

THIS was an action on a policy of aſſurance on goods. The declaration conſiſted of three counts; the firſt was on the policy, the ſecond was on an adjuſtment, and the third for money had and received. The Defendant pleaded the general iſſue, and the cauſe coming on to be tried before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after laſt *Michaelmas* term, the defence relied upon and proved was fraud in effecting the policy, the Plaintiff, who reſided at *Hamburgh*, and ſent from thence the letter ordering the inſurance, having been aware at the time he ſent that letter, that the ſhip on board which the cargo inſured had ſailed, was loſt; accordingly a verdict was found for the Defendant. But before the Defendant went into his caſe, the Plaintiff's counſel objected to any evidence being received which tended to avoid the contract, inſiſting that the Defendant who had paid the premium into court generally, without confining it to the money count, had thereby admitted the validity of the contract, and the Plaintiff's right to recover upon it, and had precluded himſelf from offering any evidence but ſuch as went to reduce the value of the goods inſured. His Lordſhip, however, overruled the objection.

A rule *niſi* having been obtained, calling on the Defendant to ſhew cauſe why a new trial ſhould not be had; the Defendant's attorney in anſwer to that application, made an affidavit ſtating the following circumſtances: that the cauſe was tried on admiſſions of all other material facts except the queſtion of fraud; that the Plaintiff, in a bill filed in the Exchequer againſt the underwriters, for a commiſſion to examine witneſſes at *Hamburgh*, ſtated the preciſe point in iſſue, *viz.* the fraud in antedating the letter of orders; that on the 7th of *February* 1803, the Defendant, under a rule for withdrawing the plea of the general iſſue, pleading it *de novo* and

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paying money into court, paid the premiums into court; the Defendant at the ſame time conſenting to a commiſſion for the examination of witneſſes at *Hamburgh*; that after the money ſo paid in, copies of the interrogatories and croſs-interrogatories on the part of the Defendant, directed ſolely to the queſtion of fraud, were communicated to the Plaintiff's attorney; that on the 18th of *February* 1803, the attornies on both ſides drew up a written conſent that the depoſitions taken under the above interrogatories and croſs-interrogatories ſhould be read in evidence in this cauſe which had been ſet down for trial, inſtead of one of the other cauſes in which the conſent for the commiſſion had been obtained (all having been conſolidated, that is four upon the event of this cauſe, and four upon the event of the cauſe ſet down); and that the Plaintiff's attorney, inſtead of apprizing the Defendant's attorney of any objection on the ground of the contract being admitted by the mode in which the money had been paid into court, had on the day before the trial of the cauſe, applied for and obtained an admiſſion of the ſubſcription to the policy.

Bayley Serjt. ſhewed cauſe and argued, in the firſt place, that the payment of the premium into court generally, was not ſuch an admiſſion of the contract as precluded the Defendant from ſhewing that the policy was void as having been fraudulently effected. But as the Court gave no opinion upon this point the argument is omitted.] *2dly*, He inſiſted that the Plaintiff had waved the right of making the objection now urged, inaſmuch as he had by his conduct put him to the expence and trouble of collecting that very evidence, the receipt of which he oppoſed at the trial, and that the Court therefore would not allow him to be heard upon it.

Shepherd Serjt. *contrà*, contended that nothing but a poſitive agreement could preclude the Plaintiff from inſiſting on a point of law; and that if the circumſtance of his having prepared to ſupport his caſe upon other grounds were to be deemed a ſufficient reaſon for preventing him from inſiſting on a legal advantage, the ſame argument might be uſed in every caſe where a point of law is ſtarted at the trial, even though it ſhould happen to be ſuggeſted by the counſel at the trial for the firſt time.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord ALVANLEY Ch. J. We wiſh to be underſtood to give no opinion upon the point whether the payment of money into court in

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this caſe did or did not admit the contract, and eſtabliſh the Plaintiff's right of action; becauſe, under the circumſtances of this caſe, we think the Plaintiff is not at liberty to avail himſelf of ſuch an objection. The Defendant paid the premiums into court on the 7th of *February*, and after that act done by him, the interrogatories and croſs interrogatories were communicated, all tending to eſtabliſh that fraud which was the only point in diſpute, and the examinations at *Hamburgh* were permitted to proceed. Indeed, up to the time of the trial, the ſame conduct was purſued by the Plaintiff, and the queſtion therefore is Whether we ought to liſten to ſuch an objection as has been taken to the evidence offered on the part of the Defendant, when the Plaintiff himſelf induced him to procure that evidence? As ſoon as the money was paid into court the objection ſhould have been communicated, and not having been communicated, we are all moſt clearly of opinion, that the Plaintiff is not now at liberty to object to the receipt of the evidence in queſtion.

Rule diſcharged.

Two other points afterwards aroſe in this caſe. Eight actions had been commenced reſpecting the ſame riſk, four upon one policy, which were conſolidated by one rule, and four upon another policy, which were conſolidated by another rule; but both conſolidation rules were entered into previous to the payment of money into court. One cauſe under each rule was ſet down for trial; and after the preſent cauſe had been tried, the Plaintiff withdrew the record in the other. In taxing the coſts, the prothonotary allowed to the Plaintiff the coſts of the three ſhort cauſes, which depended on the event of this cauſe, up to the time of paying the money into court, and in taxing the coſts of the commiſſion, which by the rule had been made to abide the event of the trial, refuſed to allow the Defendant the expences of taking the examinations at *Hamburgh*, or of bringing witneſſes from *Lubeck* to *Hamburgh* to be examined under the commiſſion, only allowing the coſts of the commiſſion. In conſequence of this, a rule *niſi* was obtained for the prothonotary to review his taxation, in ſupport of which, as to the firſt point, the caſe of *Burſtall* v. *Horner*, 7 *T. R.* 372, was relied upon, where the Court of *King's Bench* held, that by the fair conſtruction of the conſolidation rule, the Plaintiff was bound as well as the Defendant, and that as a nonſuit in one action was concluſive in all the others, the Plaintiff was not entitled to coſts in any of them,

even up to the time of the money being paid into court; and it was intimated that the case of *Wilton* v. *Place*, *ante*, vol. 2. p. 56., where a contrary practice had been stated by the prothonotary and adopted by the Court, was founded on a mistake.

But on this point *the Court* were of opinion with the prothonotary, thinking the practice of this Court more reasonable than that of the *King's Bench*, for that the Defendant, by paying money into court, admitted that the Plaintiff was right to that amount, and that the Plaintiff therefore ought not to be deprived of those costs which he had been led into by the Defendant.

In support of the second point, the particular words of the rule of this Court under which the commission was issued were referred to, namely, "to examine witnesses at *Hamburgh* and *Lubeck*," and consequently, as the commission was directed to persons resident at *Hamburgh*, the witnesses resident at *Lubeck* must be brought to *Hamburgh*.

And *The Court* assenting to this, directed the prothonotary to allow the expences of taking the examinations at *Hamburgh*, and of bringing the witnesses from *Lubec* to *Hamburgh*.

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ASSUMPSIT. The first count of the declaration was on a bill of exchange for 30*l.* drawn by one *John Crouch* on the Defendant, payable to the order of *J. F.*, accepted by the Defendant, and indorsed to the Plaintiff. The second count stated that the Defendant, according to the usage and custom of merchants, made his certain draft or order in writing, commonly called a banker's draft or check, upon Messrs. *Pread* and Company for 30l., and delivered the same to the Plaintiff, and averred a presentment for payment and refusal. There were also counts for money paid, money laid out and advanced, money had and received, and on an account stated. At the trial before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after last *Trinity* term, the bill declared upon in the first count, when produced, appeared to be drawn by one *John Couch*, instead of *John Crouch*, as alleged. It was proved that when the bill was presented to the Defendant, he accepted it, saying, that

If a bill drawn by *John Couch* be declared upon as drawn by *John Crouch*, the variance is fatal.

An unstamped banker's check post-dated is void.

A bill being presented by the indorsee to the drawee for acceptance, the latter on accepting it said, that he expected a remittance from the drawer in a few days, and that as he had a bill of the drawer in his hands which would be paid, he would take all risks. Held that this conversation, together with the bill accepted by the drawer, did not amount to sufficient evidence to entitle the indorsee to recover against the drawee the amount of the bill accepted on a count for money had and received.

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though *Couch* had not remitted to him, yet that he expected he would do ſo in a few days, and that as he had a bill of *Couch* in his hands for 80*l.* which would be paid, he would take all riſks upon himſelf, and accordingly gave the Plaintiff a check upon his bankers Meſſrs. *Praed* and Co. for 30*l.* poſt-dated, ſo as not to be receivable at the banker's until after the time at which the Defendant expected a remittance from *Couch*. The Defendant afterwards finding that *Couch* did not remit, ſtopped the payment of the draft. Upon this evidence it was objected for the Defendant, that the variance between the name of the drawer ſtated in the firſt count of the declaration, and that which appeared upon the bill was fatal with reſpect to that count; and ſecondly, that the draft being poſt-dated was void, not being within the exemption of the 31 *Geo.* 3. *c.* 25. *ſ.* 4. Lord *Alvanley* was of opinion that the firſt objection was fatal, but directed the jury to find a verdict for the Plaintiff on the other counts, reſerving liberty to the Defendant to move the Court to ſet that verdict aſide. A rule *niſi* having accordingly been obtained on a former day,

Shepherd Serjt. now ſhewed cauſe. After the caſe of *Allen* v. *Keeves*, 1 *Eaſt*, 435, it is impoſſible to contend that the draft in this caſe is within the exception contained in the 4th ſection of 31 *Geo.* 3. *c.* 25. Conſidering the draft however as out of the queſtion, the verdict may be ſupported upon the money counts. Although there was not originally that privity between theſe parties which exiſts between the drawer and acceptor of a bill, yet the circumſtance of the Defendant promiſing to pay the bill becauſe he had another bill of the drawer in his hands which would be paid, is ſufficient *primâ facie* evidence to entitle the jury to preſume that he did receive the money upon that bill, until he ſhews the contrary. If this preſumption be allowed, the money, which the Defendant may be ſuppoſed to have received upon that bill, is money had and received to the drawer's uſe, which he has promiſed to pay over to the Plaintiff. In *Tatlock* v. *Harris*, 3 *T. R.* 174, a bill of exchange having been drawn by the Defendant amongſt others upon himſelf, in favour of a fictitious perſon, and accepted by him, and the Defendant having received the value of it, a *bonâ fide* holder recovered againſt the Defendant upon the money counts; and Lord *Kenyon* ſaid, that it was an appropriation by the Defendant of ſo much money to be paid to the perſon who ſhould become the holder of the bill. In this caſe, therefore,

the Defendant not having ſhewn that the bill of the drawer which he had in his hands, and which he ſaid would be paid, was not paid, it muſt be preſumed that it was paid, if ſo, the Defendant had ſpecifically appropriated a part of the amount to the Plaintiff's uſe. In *Iſrael* v. *Douglas*, 1 *H. Bl.* 239, the Court of *Common Pleas* held that an action for money had and received might be maintained againſt the Defendants, who being indebted to one *Del Vallé* for brokerage, and *Del Vallé* being indebted to the Plaintiff for money lent, *Del Vallé* gave an order to the Defendants to pay the Plaintiff the ſum due from them to himſelf, as a ſecurity; which order was accepted by the Plaintiff, and on which the Plaintiff lent *Del Vallé* a further ſum. In that caſe the Defendants had not actually received money belonging to the Plaintiff any more than the Defendants in this Caſe, yet the Court held that the fair effect of the tranſaction was, that the Defendant might be deemed to have received money to the Plaintiff's uſe; Lord *Loughborough* obſerving, that they were eſtopped by their own promiſe. So in *Fenner* v. *Meares*, 2 *Bl.* 1269, the action for money had and received was held to be maintainable in favour of the aſſignee of a *reſpondentia* bond, where the obligor had engaged by an indorſement to pay the ſame to any aſſignee. The ſame doctrine is ſupported by the caſe of *Grant* v. *Vaughan*, 3 *Burr.* 1516, where it was laid down that the holder of a note made payable to bearer might maintain an action for money had and received againſt the drawer. It only remains then to be conſidered, whether, as the Defendant acknowledged to the Plaintiff that he had a bill in his hands belonging to the drawer of the bill which would be paid, it muſt not be preſumed that it was paid, and that he received the money, ſince the contrary was not ſhewn. To this point the caſe of *Longchamp* v. *Kenny*, *Doug.* 137, may be cited. There the Defendant having got poſſeſſion of a maſquerade ticket given to the Plaintiff to diſpoſe of, and which the latter was to account for to the owner, upon being required by the owner to pay the produce of it, ſaid, "Well, if I had it, what then? Go to the perſon who received it of you, and let him pay it," upon which, the Plaintiff, to avoid arreſt, paid the value of the ticket to the owner, and brought an action for money had and received againſt the Defendant, and was permitted to recover in that form of action. The Court in that caſe ſaid, that if the Defendant had ſold the ticket and received the value of it, it was for the Plaintiff's

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uſe, the ticket being his; and that as he had not produced the ticket, it was a fair preſumption that he had ſold it.

Vaughan Serjt. in ſupport of the rule. The verdict in this caſe cannot be ſuſtained upon the money counts, for it having been expreſsly found that the Defendant at the time he accepted the bill drawn upon him by *Couch*, had no effects in his hands, though he expected a remittance from *Couch*, his acceptance can only be conſidered as an acceptance for the honour of the drawer. None of the caſes, therefore, in which an acceptance has been held to be *primâ facie* evidence of money in the hands of the acceptor, are applicable to the preſent caſe; for the circumſtances of this caſe preclude the Plaintiff from ſaying that the Defendant had money belonging to the drawer in his hands at the time of the acceptance. Indeed, the argument inſiſted upon for the Plaintiff goes the length of ſhewing that in no caſe whatever is it neceſſary to declare againſt the acceptor upon a bill of exchange: for if the Plaintiff in this caſe ought to recover, reſort may always be had to the money counts, and the bill merely be employed as evidence in ſupport of thoſe counts. The caſe of *Tatlock* v. *Harris* is perfectly diſtinguiſhable from this: there all the parties were privy to the nature of the tranſaction, and the Defendant had allowed his name to be uſed upon the bill for the purpoſe of raiſing money. With reſpect to the caſe of *Longchamp* v. *Kenny*, it was there ſhewn that the value of the ticket which the Defendant had retained was five guineas, and the preſumptive evidence that he had actually received that ſum was extremely ſtrong, for his expreſſion on being charged with having received the money amounts almoſt to a confeſſion that he had received it. In this caſe the only evidence to charge the Defendant, is his acknowledged expectation that a bill of the drawer in his poſſeſſion would be paid when due; but *non conſtat* that he was not deceived in his expectation, and poſſibly the bill ſtill remains unpaid.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord ALVANLEY Ch. J. This was an action on a bill of exchange with a count on a banker's check, and alſo the common money counts. On the firſt and ſecond counts the Plaintiff is precluded from recovering, by objections in law taken on the part of the Defendant, which are inſurmountable. The Plaintiff however inſiſts that he is entitled to recover upon the count for money had and received. Upon that point the queſtion for our conſideration ariſes on the converſation

converſation which paſſed between the parties at the time when the Defendant accepted the bill drawn upon him by *Couch*, and of which the Plaintiff was indorſee. At that time the Defendant told the Plaintiff that he expected remittances from *Couch*, and that as he had a bill for 80*l.* belonging to *Couch* in his hands, which would be paid, he would run all riſks, and accordingly gave the Plaintiff a check upon his banker. The queſtion then is, whether this declaration of the Defendant's be not *primâ facie* evidence that the 80*l.* bill was paid? for if that bill was paid the action for money had and received would be maintainable on the ground of the Defendant's ſpecific appropriation of that money to the payment of the Plaintiff's demand. It has been contended that the above declaration of the Defendant's puts it upon him to ſhew that the bill was not paid. In ſupport of this propoſition the caſe of *Longchamp* v. *Kenny* was relied upon, where Lord *Mansfield* held that the ſale of a ticket and the receipt of the price by the Defendant might be preſumed againſt him unleſs he produced the ticket. But in that caſe there was abundant evidence out of the Defendant's own mouth that he had received the price of the ticket till he proved the contrary. Indeed there was another circumſtance in that caſe which diſtinguiſhes it from the preſent, *viz.* that the Defendant there had complete notice of the queſtion which was to be tried between himſelf and the Plaintiff, and could not be ſurpriſed by the form of the count under which the plaintiff recovered. In this caſe it was undoubtedly a ſurpriſe upon the Defendant, for he came to trial prepared to reſiſt the counts upon the bill and check, and to ſhew that he never accepted the former. It would be going too far therefore to preſume that becauſe the Defendant did not produce the 80*l.* bill (which was not in queſtion) he muſt have received the amount. The caſe of *Longchamp* v. *Kenny* therefore is diſtinguiſhable from the preſent, and the Plaintiff, whatever be the merits of his caſe, muſt be nonſuited.

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Rule abſolute.

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WRIGHT *v.* WALKER.

If bail above be put in and juſtified within four Days from the ruling the Sheriff to bring in the body, the Court will ſet aſide all proceedings upon the bail bond commenced previous to the time of juſtification.

THE ſheriff having been ruled to bring in the body on the 23d of *November*, the Plaintiff immediately afterwards took an aſſignment of the bail-bond, ſued out writs againſt the Defendant and the bail returnable on the 25th, and delivered declarations againſt them. On the 25th bail above were put in; and notice of juſtification having been given, the bail were juſtified within the four days from the ruling of the ſheriff. A rule having been obtained to ſhew cauſe why the proceedings on the bail-bond ſhould not be ſet aſide for irregularity,

Bayley Serjt. now ſhewed cauſe, and contended, that although the Plaintiff, after taking an aſſignment of the bail-bond, is not at liberty to proceed againſt the ſheriff, yet that, according to the practice of the Court, he is at liberty, after ruling the ſheriff, to take an aſſignment of the bail-bond and proceed thereon.

Sellon Serjt. *contra*, inſiſted that the Plaintiff, by ruling the ſheriff to bring in the body, had given four days to put in bail, and as bail had been put in within that time the Plaintiff ought not to have proceeded on the bail-bond.

The Court were of opinion, that as bail had been put in and juſtified according to the rule upon the ſheriff, it was not competent to the Plaintiff to proceed upon the bail-bond; though, if the rule upon the ſheriff had not been complied with the Plaintiff might have taken an aſſignment of the bail-bond, and have proceeded upon it after having ruled the ſheriff.

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Hall v. Stevenson.

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Covenant by the aſſignee of certain ſhares in a patent-right that he has good right, full power, and lawful authority to aſſign and convey the ſaid ſhares, and that he has not by any means directly or indirectly forfeited any right or authority he ever had or might have had over the ſame. Held that the generality of the former words of the covenant is not reſtrained by the latter.

If the aſſignees of an uncertificated bankrupt in their own names execute a deed with other creditors, whereby they, and all the creditors who may ſign the ſaid deed, releaſe the bankrupt from all actions, ſuits, claims, and demands againſt him or his eſtate, and ſuch deed be not ſigned by all the creditors of the bankrupt, the aſſignees are not barred from claiming as aſſignees the benefit of a patent-right afterwards obtained by the bankrupt. A patent-right for the excluſive exerciſe of an invention obtained from the Crown by an uncertificated bankrupt, is affected by the previous aſſignment of the commiſſioners, and veſts in the aſſignees.

An act of parliament, empowering ſuch bankrupt patentee, his executors, adminiſtrators, and aſſigns, to aſſign the right to a greater number of perſons than allowed by the letters patent, and declared to be a public act, does not enable either the bankrupt or his aſſignee to make a better title than they could before the act.

THIS was an action of covenant, tried before Lord *Alvanley* Ch. J. at the ſittings after Eaſter Term 1803. The declaration ſtated, that by deed poll made by the Defendant on the 5th of *January* 1804, reciting that certain letters patent had been granted by his preſent Majeſty to one *Matthias Koops*, bearing date reſpectively the 17th day of *February* and the 18th day of *May* 1801, granting unto the ſaid *M. Koops*, his executors, adminiſtrators, and aſſigns, the ſole privilege of making paper from ſtraw, hay, thiſtles, waſte and refuſe of hemp and flax, and different kinds of wood and bark, for the term of 14 years, and 14 years, from the reſpective dates of the ſaid reſpective letters patent, and for the places in the ſaid letters patent particularly and reſpectively mentioned; alſo reciting, that the ſaid *M. Koops*, by deed of aſſignment of the 26th of *February* 1801, aſſigned over certain ſhares of the ſaid letters patent unto *James Stevenſon*, (the Defendant,) *John Forbes*, *John Hunter*, and *William Tate*, their executors, adminiſtrators, and aſſigns; and alſo reciting, that by an act of parliament paſſed in the 41ſt year of his preſent Majeſty's reign it was (among other things) enacted, that it ſhould and might be lawful to and for the ſaid *M. Koops*, his executors, adminiſtrators, and aſſigns, or any or either of them, to transfer or aſſign the ſaid letters patent reſpectively, or either of them, or any part or ſhare, parts or ſhares thereof, or any benefit or advantage to ariſe therefrom, to any number of perſons not exceeding 60; and alſo reciting, that the ſaid *James Stevenſon* had agreed to ſell and diſpoſe of ten 1000th parts or ſhares of and in the ſaid letters patent to the Plaintiff in conſideration of the ſum of 1800*l.*, and that the ſaid *James Stevenſon* aſſigned the ſame accordingly; the ſaid *James Stevenſon* did by the ſaid deed poll covenant, promiſe, and agree to and with the ſaid *O. L. Heſſe*, his executors, adminiſtrators, and aſſigns, that he the ſaid *James Stevenſon* had good right, full power, and abſolute and lawful authority to aſſign and convey

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the ſaid ten 10000th parts or ſhares of and in the ſaid letters patent and concern for making paper from ſtraw and other baſe materials, and then the Plaintiff aſſigned by way of breach that the ſaid *James Stevenſon* had not good right, full power, or abſolute or lawful authority to aſſign and convey the ſaid ten 10000th parts or ſhares of and in the ſaid letters patent and concern, according to the tenor and effect, intent and meaning of the ſaid deed poll. The Defendant by his plea craved oyer of the deed, and the covenant was ſtated in theſe words, "That I, the ſaid *James Stevenſon*, have good right, full power, and abſolute and lawful authority to aſſign and convey the ſaid ten 10000th parts or ſhares of and in the ſaid letters patent and concern for making paper, &c. and that I have not, by any means, directly or indirectly, forfeited any right or authority I ever had, or might have had, over the ſame ten 10000th parts or ſhares." And then the Defendant pleaded, that he had good right, full power, and abſolute and lawful authority to aſſign and convey the ſaid ten 10000th parts or ſhares of and in the ſaid letters patent and concern, according to the tenor, effect, intent and meaning of the ſaid deed poll, and of the covenant of the ſaid *James Stevenſon* in that behalf made as aforeſaid; upon which iſſue was joined. The jury found a verdict for the Plaintiff for 1800*l.*, ſubject to the opinion of the Court upon the following caſe:

On the 30th *June*, in the year 1790, a commiſſion of bankrupt iſſued againſt the ſaid *M. Koops*, whereupon he was duly declared a bankrupt, and *William Chapman* and *Thomas Hill* were choſen aſſignees under the ſame; and from that time to this, the ſaid *M. Koops* hath not obtained his certificate. On the 17th day of *February* and the 18th day of *May* 1801, the ſaid *M. Koops* obtained his Majeſty's letters patent, as ſtated in the declaration. An act of parliament, paſſed in the 41ſt year of the reign of his preſent Majeſty, recited in the deed and in the ſaid declaration, enabling the ſaid *M. Koops*, his executors, adminiſtrators, and aſſigns, to aſſign the benefit of the ſaid invention to any number of perſons not exceeding 60, &c., which act is declared to be a public act. On the 9th day of *September* 1801, the creditors of the ſaid *M. Koops* executed a deed, which, after reciting the commiſſion of bankrupt, and the ſeveral proceedings had under the ſame, and that the ſaid *M. Koops* had, by advertiſement in the *London Gazette*, called a meeting of his creditors on the 12th day

of

of *June*, at which he propoſed to pay all his creditors, who had proved their debts under the ſaid commiſſion, as much as then remained due to them, namely, five ſhillings in the pound, within one month, and the remainder by three inſtalments, to be ſecured by the ſaid *M. Koops* in ſuch manner as his ſaid aſſignees ſhould think proper; but that ſuch inſtalments of the foreign debts ſhould be depoſited in the hands of bankers to be approved of by his ſaid aſſignees, or paid into the Court of Chancery, to abide the event of an application to that Court, to be made within twelve months; and that the ſaid *M. Koops* ſhould indemnify the aſſignees againſt all the coſts of ſuch application, and the carrying the agreement after mentioned into effect; and that thereupon, by a memorandum in writing, ſigned by the creditors of the ſaid *M. Koops*, parties thereto, dated the ſaid 12th day of *June* 1801, after reciting the ſaid propoſal, it was unanimouſly agreed by the ſaid ſeveral creditors that the ſaid propoſal ſhould be acceded to, and that the aſſignees ſhould take ſuch meaſures as might be neceſſary to carry the ſame into effect; and that, on receipt of the firſt inſtalment, and ſuch ſecurity being given for the payment of ſuch reſpective debts, and depoſiting the firſt dividends on the foreign debts by the ſaid *M. Koops*, the ſaid ſeveral creditors did thereby undertake, ſo far as concerned themſelves, reſpectively to execute good and ſufficient releaſes in the law to the ſaid *M. Koops*, and to give him ſuch aſſiſtance in ſuperſeding the commiſſion of bankrupt as the ſaid aſſignees ſhould think proper; and further reciting, that the ſaid *M. Koops* had, in purſuance of the aforeſaid agreement, paid to the aſſignees, and ſuch other of the ſaid ſeveral creditors of the ſaid *M. Koops*, parties thereto, as were reſident in *England*, five ſhillings in the pound upon the amount of their reſpective debts proved; and that, on the day of the date of the ſaid deed, he paid into the banking-houſe of Baron *Dimſdale* and Co., to the account of the aſſignees, five ſhillings in the pound on the foreign debts; and alſo, that in purſuance thereof the ſaid *M. Koops* had given to the aſſignees a warrant of attorney for 20,000*l.* to ſecure the remaining fifteen ſhillings in the pound. It was witneſſed, that in conſideration of the premiſes, the ſaid *M. Koops* did undertake to pay the ſaid *William Chapman* and *Thomas Hill*, their executors, adminiſtrators, or aſſigns, the remaining fifteen ſhillings in the pound, in truſt, to pay themſelves and the reſt of the creditors, parties thereto, reſident within this kingdom, the re-

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maining fifteen ſhillings in the pound on their reſpective debts, by three inſtalments; and alſo to pay into the ſaid banking-houſe, in the name of the aſſignees, the remaining fifteen ſhillings in the pound upon the foreign debts; and in caſe of any ſurplus after payment of ſuch debts, and all coſts and expences, to pay the ſame to the ſaid *M. Koops*, his executors or adminiſtrators, or otherwiſe, as he or they ſhould direct; and it was further witneſſed, that in purſuance of the aforeſaid agreement, and in conſideration of the premiſes, they, the ſaid *William Chapman* and *Thomas Hill*, and the ſeveral other creditors of the ſaid *M. Koops*, parties thereto, did remiſe, releaſe, and quit claim unto the ſaid *M. Koops*, his heirs, executors, and adminiſtrators, all actions, ſuits, claims, and demands whatſoever, which they or any or either of them then had or hath, or thereafter ſhould or might have, challenge, claim, or demand, againſt the ſaid *M. Koops*, his heirs, executors, adminiſtrators, or his or their eſtate or effects, on account of the debts to them or any or either of them then due and owing from the ſaid *M. Koops*, or of any other cauſe, matter, or thing whatſoever, ſave and except ſuch actions, ſuits, claims, or demands as might ariſe under or by virtue of the ſaid deed, or of the ſaid bond or judgment therein-before recited; and further, that until default in payment of the inſtalments, the ſaid *William Chapman* and *Thomas Hill* ſhould not take out execution on the ſaid judgment, or proceed on the ſaid bond, or otherwiſe moleſt the ſaid *M. Koops*; and that upon payment of the ſaid inſtalments ſatisfaction ſhould be acknowledged on the roll. Three of the creditors of the ſaid *M. Koops*, who had proved debts under his commiſſion to the amount of about 600*l.*, never executed ſuch deed. The ſaid *M. Koops* paid the firſt inſtalment, but failing to pay the ſubſequent inſtalments, he lodged certain ſecurities in the hands of the ſolicitor to the aſſignees, amounting to 1690*l.* 11*s.* 6*d.*, the produce of which has ſince been received by the aſſignees for the benefit of the creditors. He alſo lodged certain ſecurities from a Mr. *Richard Twiſs* in the ſame hands, to the amount of 3500*l.* which has ſince been proved by the ſaid *William Chapman* and *Thomas Hill*, under a commiſſion of bankrupt againſt the *Richard Twiſs*, and the remainder of the ſaid fifteen ſhillings in the pound not having been ſatisfied by the ſaid *M. Koops*, the ſaid *William Chapman* and *Thomas Hill* entered up judgment againſt the ſaid *M. Koops*

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on the warrant of attorney given by the ſaid *M. Koops* on the 31ſt day of *March* 1802, and on the 14th day of *October* 1802, iſſued a *fi. fa.* thereon, againſt the ſaid effects of the ſaid *M. Koops*, and entered the dwelling-houſe of the ſaid *M. Koops*, ſold his furniture and other effects therein, amounting to a conſiderable ſum of money, and alſo entered upon the premiſes where the manufactory under the ſaid letters patent and act of parliament were carried on, and took poſſeſſion of the ſame and the effects therein, under the ſaid execution, and ſtill continue to keep poſſeſſion thereof.

The queſtion was, Whether the Plaintiff was intitled to recover? if ſo, the verdict to ſtand, if not, to be entered for the Defendant.

Onſlow Serjt. for the Defendant, was called upon by the Court to begin. Firſt, Upon the fair conſtruction of the covenant upon which the Plaintiff has declared he cannot recover, unleſs he ſhew by way of breach, that the Defendant has by ſome act of his own impeached that title which he conveyed to the Plaintiff. Secondly, Suppoſing the conveyance from the Defendant to have been imperfect, ſtill the aſſignees, by their conduct, have precluded themſelves from diſputing the title which the Defendant conveyed to the Plaintiff. Thirdly, The intereſt of *M. Koops* in the patent did not paſs under the aſſignment of the Commiſſioners of Bankrupt. Laſtly, The act of parliament ſtated in the caſe, enabled the Plaintiff to convey a good title. Firſt, the words of the covenant are, that the Defendant has good right, full power, and abſolute and lawful authority to aſſign and convey, but they are followed by the qualification, that he has not done any thing to forfeit his right. This qualification muſt be conſtrued to control the whole covenant; nor will the arrangement of the words vary that conſtruction. The doctrine laid down in *Browning* v. *Wright*, *ante*, vol. 2. p. 13., is peculiarly applicable to the preſent caſe. In that caſe, Lord *Eldon*, after ſtating that covenants againſt the acts of all mankind, are in general only required in conveyances of leaſehold property, obſerves, " What would be the uſe of any of the other covenants if the covenant relied on were general? It would be of little ſervice to the grantor to inſiſt that the warranty and the covenants for quiet enjoyment and further aſſurance were ſpecially confined to himſelf and his heirs, if the grantee were at liberty to ſay, I cannot ſue you on thoſe covenants, but I have a cauſe of action ariſing on a general covenant that ſuperſedes them all." In ſupport

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of his reaſoning upon this point, his Lordſhip refers to the caſe of *Fielder* v. *Studley*, *Finch* 90. Mr. J. *Buller* ſays: "The Defendant has expreſsly told us in one part of the deed, that he means to covenant againſt his own acts, and are we to ſay that he has in the ſame breath covenanted againſt the acts of all the world?" And Mr. J. *Heath* obſerves that, "When any ſentence contains diſtinct covenants, and there are words of reſtriction either in the prefatory or concluding part, thoſe words muſt be extended to every part of the ſentence, unleſs the intention of the parties appear to require a contrary conſtruction." On the authority of this caſe, I contend that the Defendant's covenant is confined to the impeachment of his title by ſome act of his own. Both in deeds and wills the Court is to look to the real intent of the parties. The principle above laid down by Mr. Juſtice *Heath* is very old, and was adopted by Lord *Mansfield* in the caſe of *Kingston* v. *Fraſer*, *cit. Doug.* 669. *ed.* 2. The caſe of *Nervin* v. *Munns*, 3 *Lev.* 46. is a very ſtrong authority in favour of the Defendant. In that caſe there were four covenants, the firſt, third and fourth were reſtrained to the acts of the grantor and his anceſtors, the ſecond was unlimited; and three Judges againſt *North* Ch. J. held, that as the grantor had firſt covenanted againſt his own acts, it could not be intended that he had immediately afterwards, in a covenant to the ſame effect, covenanted againſt the acts of all the world. If the caſe of *Gainſforth* v. *Griffith*, 1 *Saund.* 60. be relied upon by the other ſide, the ſame anſwer which was given to it in *Browning* v. *Wright* may be given here; namely, That the covenants there reſpected leaſehold property. Secondly, The Caſes of *Evans* v. *Mann*, *Cowp.* 569.; *Chippendale* v. *Tomlinſon*, *Cooke's Bank. L.* 462, ed. 1. and *La Roche* v. *Wakeman*, *Peake's N. P.* 140., ſhew that unleſs the aſſignees diſaffirm the title of an uncertificated bankrupt, he may diſpoſe of the property acquired by him ſubſequent to the bankruptcy. Beſides, the aſſignees have by their own expreſs acts precluded themſelves from diſputing the title of the bankrupt; for at a public meeting of the creditors ſummoned by advertiſement in the Gazette, they entered into a compoſition with *M. Koops*, the terms of which have been complied with by him, and in conſideration of which, the aſſignees, together with the creditors preſent at that meeting, remiſed and releaſed to *M. Koops* all actions, ſuits, claims and demands whatever. Shall the aſſignees after reaping the benefit of the compoſition entered into with *M. Koops*, now or at any future time, be

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at liberty to disaffirm his title to that property which he conveyed to the Defendant, and the Defendant to the Plaintiff? The assignees have the power of compounding a debt if they think proper, and such composition will be good against the creditors, though the conduct of the assignees may be impeached before the Lord Chancellor. Supposing the deed of composition not to be legally binding upon the assignees because some of the creditors did not assent, yet inasmuch as it has been carried into effect, it may operate in a court of equity, and may induce such court to enjoin the assignees from doing any act by which the title of the bankrupt may be disaffirmed. If so, the Defendant's title is not radically bad: for the Defendant can never be evicted, and consequently can have no right to complain of a breach of covenant. Thirdly, The right to the invention being a mere metaphysical right, did not pass to the assignees under the commission. It was nothing but a right to exercise a particular invention. Now the case of *Chippendale* v. *Tomlinson* clearly shews, that the assignees have no power to let out either the person or the talents of the bankrupt. Could not *M. Koops* have applied to monied men, and offered to exercise this invention as their servant? and could the assignees in such case have claimed the fruits of his ingenuity? [*Chambre* J. The right to the patent is made assignable: why then may it not be assigned under a commission of bankrupt?] The right of assignment contemplated in the grant was a voluntary assignment, whereas the assignment under a commission is compulsory. Lastly, The assignment of *M. Koops* to the Defendant, and consequently that of the Defendant to the Plaintiff, is authorised by the act of parliament stated in the case. The object of that act was to enable *M. Koops* to convey, and therefore necessarily establishes all conveyances made by him. In the deed by which *M. Koops*, previous to the passing of the act of parliament assigned to the Defendant, it is true that no mention was made of the bankruptcy of *Koops*; but the act of parliament subsequent to that deed, having enabled the *assigns* of *Koops* to assign over to others, is a legislative acknowledgment of the Defendant's right to execute a good conveyance to such persons as he should think fit.

Bayley Serjt. for the Plaintiff. The cases cited respecting covenants do not apply to this case, in which the general covenant

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relied upon is of a different nature from the particular covenants in the ſame deed, and is independent of them. In the caſe of *Browning* v. *Wright* the covenants were preceded by theſe introductory words, "for and notwithſtanding any thing by him done to the contrary," which words were applicable as well to the covenant in diſpute as to that which preceded it. The caſe of *Fielder* v. *Studley*, was an application to a court of equity by bill for relief againſt an action of covenant at law on the ground of a miſtake; it appearing by the deed that all the covenants were made with the ſame view, and yet that one of them was general and all the reſt limited; the foundation of the decree therefore was, that the parties had made a miſtake, ſince the covenant ſued upon was contradicted by the reſt. It may alſo be obſerved of the caſe of *Nervin* v. *Muns*, that both covenants were made with the ſame intent, and therefore to have given effect to one as general, and to the other as limited, would have been a groſs contradiction. In order therefore to bring this caſe within the authority of the above deciſions, it muſt be made out that the covenant now ſued upon is inconſiſtent with the other covenants in the ſame deed. If in, fact, that deed had contained any other covenants inconſiſtent with the general covenant for title, the Defendant would have ſet them out upon oyer, and have thus brought them before the court. The latter part of the covenant ſet out, by which the Defendant declares that he has not forfeited his right, may perhaps have been unneceſſary, after the former general ſtipulation, that he had good right to convey; but though unneceſſary, it is not contradictory to the former part. It has alſo been urged upon the authority of *La Roche* v. *Wakeman*, that *Koops* had good title to convey, notwithſtanding his bankruptcy; but that caſe only proves that an uncertificated bankrupt has a good title againſt a wrong-doer. Lord *Kenyon* there ſays, "If the aſſignees of *Smith* (the bankrupt) take any ſteps to diſaffirm his title they may do ſo; but if they do not, he being the oſtenſible owner, may convey a title to the Plaintiffs, ſubject to be diſaffirmed by them." The aſſignees therefore have a better title than the bankrupt, and may interfere to defeat his conveyance. In the caſe of *Evans* v. *Mann*, it was determined, that the aſſignees of a bankrupt may maintain an action for the value of goods acquired by an uncertificated bankrupt ſubſequent to his bankruptcy, and ſold by him, without naming themſelves aſſignees; Lord *Mansfield* obſerving, that the

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property of the goods was in the assignees, and that the sale by the bankrupt was a contract by him as their agent, and on their account. So in this case, though the assignees suffered *Koops* to carry on the patent, they might have taken it to themselves. The cases of *Webb* v. *Fox*, 7 *T. R.* 391. and *Fowler* v. *Down*, *ante*, vol. 1. p. 44. proceeded upon the same principle as that of *La Roche* v. *Wakeman*, admitting the right of the assignees to interfere, but allowing the bankrupt himself to maintain an action until such interference should take place. If the instrument executed in this case by the assignees, is to be considered as an assignment to *Koops*, it was an assignment upon terms which have not been complied with; for he contracted to pay the remainder of the debts, which he had not done. With respect to the objection that the patent did not pass under the assignment, it is sufficient to observe, that all property, both real and personal, and *choses in action* belonging to a bankrupt, pass to his assignees. If the patent in question be devisable and assignable by the bankrupt, as it undoubtedly is, why may it not pass under the assignment executed by the commissioners to the assignees? Lastly, The act of parliament stated in the case gave no authority to the Defendant to assign which he had not before the passing of that act, except as to the number of persons to whom he was permitted to assign. That act was passed *diverso intuitu*; the Legislature not having in contemplation the question, whether the property belonged to the assignees or not, but only regarding the expediency of allowing the patent-right to be divided into a greater number of shares. This appears from the preamble, which recites the very difficulty which the Legislature intended to obviate.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord ALVANLEY Ch. J. The question in this case arises upon a deed poll, bearing date the 5th of *January* 1802, by which the Defendant gives and grants to the Plaintiff a share in his patent-right. The deed is not stated at length upon the record, but we consider the case as if the whole deed were now before us, because the covenants contained in that deed which are not set forth, are not at variance with the covenant upon which the breach is assigned. The covenant, upon which the question immediately arises, is, that the Defendant had good right, full power, and absolute and lawful authority to convey; and that he had not by any

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means, directly or indirectly, forfeited any right or authority he ever had, or might have had over the property in queſtion. This action ariſes upon the firſt part of the covenant, and the breach aſſigned is, that the Defendant had not good right, full power, and abſolute and lawful authority to convey. We are called upon to decide upon the true conſtruction of this covenant. It has been contended, upon the authority chiefly of *Browning* v. *Wright*, that this does not amount to an abſolute covenant for good title, but muſt be confined to the acts of the party himſelf. We have looked with great attention into that caſe; and after the very able manner in which the principles which govern the conſtruction of covenants, were then laid down by Lord *Eldon* and the other Judges, it is unneceſſary for me to enter at any length into the ſubject. Almoſt every caſe which bears upon the point is there cited; and indeed I find more of them there ſtated than I expected, for I did not think that the Courts had formerly been ſo liberal in the conſtruction of covenants as it appears that they have been. I have examined all theſe caſes, but I do not think it neceſſary to ſtate them, for we not only agree with the principles laid down in *Browning* v. *Wright*; but we think that the caſe might have been decided as it was upon the very words of the covenant, which was reſtrained to the acts of the party himſelf by the introductory words, "notwithſtanding any thing by him done to the contrary;" and ſo Lord *Eldon* thought, though he adds, that if ſuch were not the conſtruction of the covenant itſelf, yet being coupled with the other covenant which was ſo reſtrained, it muſt be conſtrued in the ſame manner. The Defendant having covenanted that, "for and notwithſtanding any thing by him done to the contrary," he was ſeized in fee, *and that* he had good right to convey; the latter part of the covenant, coupled as it was with the former part, by the words "and that," muſt neceſſarily be overridden by the introductory words "for and notwithſtanding any thing by him done to the contrary," and this appears to have been the opinion of the whole Court: but taking the latter covenant not to be reſtrained in terms, they proceeded to conſider the rules by which covenants of this deſcription are to be conſtrued. From all the caſes upon this ſubject it appears to be determined, that however general the words of a covenant may be if ſtanding alone, yet if from other covenants in the ſame deed it is plainly and irreſiſtibly to be inferred that the party could not

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have intended to uſe the words in the general ſenſe which they import, the Court will limit the operation of the general words. The queſtion therefore always has been, whether ſuch an irreſiſtible inference does ariſe? for, if ſuch an inference does ariſe from concomitant covenants they will control the general words of an independent covenant in the ſame deed. In Lord *Eldon*'s judgment one caſe is mentioned which I think deſerves ſome notice, becauſe his Lordſhip ſeemed to ſuppoſe that the judgment of the Court proceeded upon the mere legal conſtruction of the deed, without regard to any circumſtances *debors* the deed. The caſe to which I allude is *Fielder* v. *Studley*; which appears to me to be an extremely ſtrong caſe in favour of the preſent Plaintiff, if the general covenant which was reſtrained by the other ſpecial covenants be conſidered as an independent covenant. Lord *Eldon* obſerves, that the Court muſt have proceeded "on the ground of the intent of the parties appearing on the inſtrument, ſince that intent and the conſequent legal effect of the inſtrument could only be collected from the inſtrument itſelf, and not from any thing *debors*." It muſt be remembered, however, that the application there was made to the Court of Chancery upon equitable as well as legal grounds; for, on looking into the caſe, I find that the Defendant's father, in 1657, had ſold lands belonging to the Dean and Chapter of *Sarum*, which had been diſſolved during the commonwealth. It was not very likely therefore that a party ſelling under theſe circumſtances would covenant for any thing more than his own acts. It appearing that the general covenant was manifeſtly contrary to the true intent of the parties, application was made to the Court of Chancery to correct the miſtake, in the ſame manner as applications are made to that Court to correct miſtakes in marriage articles where clauſes are inſerted contrary to the intent of the parties. The deciſion therefore did not merely proceed upon the conſtruction of a legal inſtrument, but the circumſtances entitled the party to have the covenant rectified as having gone beyond the intention of the parties. But ſuppoſing that caſe to have been decided as a queſtion at law, the queſtion here is, whether the principle I have here ſtated, applied to this caſe, requires the Court to reſtrain the general words of the covenant ſued upon? If the inference be irreſiſtible that the parties could not intend to make a general covenant, we are bound to give the Defendant the

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benefit of that inference. The property aſſigned is a ſhare in a patent-right; and it could not be unknown to the Defendant that *Koops*, the original proprietor, had been a bankrupt, though poſſibly the Plaintiff might be ignorant of that circumſtance. I have looked anxiouſly through all the concomitant covenants, in order to aſcertain whether they afforded any inference of an intention to reſtrain the covenant in queſtion, but I find none. The deed, after reciting the manner in which the property came to *Koops* ten years before, and the aſſignment to *Stevenſon*, contains a conveyance of his intereſt to the plaintiff; and then follows the warranty in queſtion, which, inſtead of being framed in the uſual and almoſt daily words, where parties intend to be bound by their own acts only, *viz.* "for and notwithſtanding any act by him done to the contrary," omits them altogether; beſides which, the Defendant covenants, that the aſſignee ſhall enjoy the property aſſigned in as ample a manner as the aſſignor. The omiſſion of theſe words is almoſt of itſelf deciſive. The attention of the purchaſer is not called by any words to the intent of the vendor to confine his covenant to his own acts. The covenant that the Defendant has paid all the calls is certainly perſonal; but the covenant for title is general: and the Court ought not to indulge parties in leaving out words which are ordinarily introduced, and by which the real meaning of the parties might be plainly underſtood. The argument on the part of the Defendant ariſes from the latter part of the covenant in queſtion. If the party meant to covenant for an abſolute right to convey, why, it is aſked, does he covenant that he has not forfeited ſuch right? To this it may be anſwered, that the latter ſtipulation, though unneceſſary, is not inconſiſtent with the former. The rule of conſtruction adopted in *Browning* v. *Wright* has never been carried to ſuch a length as to decide, that becauſe ſome clauſes are introduced into a deed which do not add to the ſecurity provided by the other clauſes, the ſecurity ſo provided is to be reſtrained. We are therefore of opinion, that the covenant for abſolute right to convey is not reſtrained by the other parts of the deed. It is contended, however, that the Defendant has conveyed a good title to the Plaintiff. And firſt, it is ſaid, that admitting the intereſt in the patent-right to have paſſed under the aſſignment of the commiſſioners, yet the aſſignees have reconveyed to the bankrupt the whole of their intereſt therein by the deed of the 9th of *September* 1801. It muſt be remembered,

however, that nothing ſhort of an actual conveyance by the aſſignees can ſuſtain that argument, and that a mere releaſe will not be ſufficient; and it was therefore inſiſted that the deed amounted to a conveyance. But I have no heſitation in ſaying, that the deed alluded to was neither intended to convey, nor did it operate in law as a conveyance. By that deed the two perſons who were the aſſignees of *Koops*, together with his ſeveral other creditors, parties thereto, in conſideration of his having agreed to pay them ſifteen ſhillings in the pound, and to ſecure the debts of the foreign creditors after the ſame rate, did remiſe, releaſe, and quit-claim to him, all actions, ſuits, claims, and demands whatſoever. But it is to be obſerved that the perſons who were aſſignees did not convey as ſuch. Indeed, if they acted as aſſignees, why was it neceſſary that the other creditors ſhould join? and they do not pretend to bind the other creditors, who were not parties to the deed. This is the deed which is ſaid to convey to *Koops* as a purchaſer all the intereſt of the aſſignees, and to make him a new man. But the words are not ſufficient for that purpoſe. It could not have been the intention of the parties. The aſſignees do not affect to convey for any perſons not parties to the deed. And the inſtalments have not been paid according to the agreement. We are therefore clearly of opinion, that it is impoſſible to conſtrue this deed to be ſuch a conveyance as has been contended for on the part of the Defendant. With reſpect to the ſuppoſed power of the aſſignees to make ſuch a compromiſe with the bankrupt as that ſtated in the caſe, and the attempt to ſhew that it amounts to a ſale of the property to him; it was not competent to aſſignees to make ſuch compromiſe unleſs the other creditors had conſented; nor could the tranſaction be deemed a ſale under the uſual powers. Next it is contended, that the nature of the property in this patent was ſuch that it did not paſs under the aſſignment; and ſeveral caſes were cited in ſupport of this propoſition. It is ſaid, that although by the aſſignment every right and intereſt, and every right of action, as well as right of poſſeſſion and poſſibility of intereſt, is taken out of the bankrupt and veſted in the aſſignees, yet that the fruits of a man's own invention do not paſs. It is true, that the ſchemes which a man may have in his own head before he obtains his certificate, or the fruits which he may make of ſuch ſchemes do not paſs, nor could the aſſignees require him

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to assign them over, provided he does not carry his schemes into effect until after he has obtained his certificate. But if he avail himself of his knowledge and skill, and thereby acquire a beneficial interest, which may be the subject of assignment, I cannot frame to myself an argument why that interest should not pass in the same manner as any other property acquired by his personal industry. Can there be any doubt, that if a bankrupt acquire a large sum of money, and lay it out in land, that the assignees may claim it? They cannot indeed take the profits of his daily labour. He must live. But if he accumulate any large sum, it cannot be denied that the assignees are at liberty to demand it; though, until they do so, it does not lie in the mouth of strangers to defeat an action at his suit in respect of such property by setting up his bankruptcy. We are therefore clearly of opinion, that the interest in the letters patent was an interest of such a nature as to be the subject of assignment by the commissioners. Lastly, it is contended, that the act of parliament stated in the case, vested a legal interest in *Koops*, for that he must be taken against all the world to have that interest which the act of parliament recites to be vested in him, that act being a public act. But though the act be public it is of a private nature; the only object of the proviso for making it a public act is, that it may be judicially taken notice of instead of being specially pleaded, and to save the expence of proving an attested copy. But it never has been held, that an act of a private nature derives any additional weight or authority from such a proviso; it only affects *Koops* and those claiming under him, and authorises him to do certain acts, which by the letters patent he could not have done: It recites the letters patent containing a clause which prevents him from assigning to more than five persons, and then enables him to assign to any number of persons not exceeding sixty. It is not possible then to consider this act as giving any title to *Koops* which he had not at the time when it passed. Such has been the construction which has always been put upon acts of parliament of this nature. We are therefore of opinion, that no aid is to be derived to the Defendant from that act of parliament.

Per Curiam. Judgment for the Plaintiff.

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Nov. 28th.

An application to change the venue from *A* to *B*, in an action for goods sold and delivered, upon an *affidavit* that the cause of action arose at *B*, and not elsewhere, may be successfully answered by an *affidavit* that the goods were sold at *C*.

THE Defendant having obtained a rule *nisi* for changing the venue from *London* to *Kent*, in an action for goods sold and delivered, upon the usual *affidavit*, that the cause of action arose in the latter county, and not elsewhere; *Lens* Serjt. on the part of the Plaintiff, produced an *affidavit*, stating, that the goods were sold and delivered at *Rotherhithe*, in the county of *Surry*; and this he contended being an answer to the *affidavit* on which the venue had been changed, inasmuch as it falsified the material allegation of the cause of action having arisen in the county of *Kent* and not elsewhere, superseded the necessity of an undertaking to give material evidence in *London*. He cited the case of *Calliand* v. *Champion*, 7 *T. R.* 205., where the Defendant, in an action upon a life insurance, having changed the venue from *Middlesex* to *London*, the Plaintiff was allowed to bring it back, on producing an *affidavit* that the person whose life was insured died in *Scotland*. He observed, that the practice of this Court had been understood to differ from the case of *Calliand* v. *Champion*, but insisted, that as a Plaintiff in a transitory action has a right to try his cause in any county in which he thinks proper, unless the Defendant will remove the venue into the county where the cause of action really arose, the plaintiff ought not to be deprived of that benefit by an *affidavit* which appears to be false; and he added, that it was impossible for the Plaintiff, in this case, to retain the venue on the usual undertaking, because he admitted that *Surry* was the county where the material evidence was to be found, the goods having been sold and delivered there.

Bayley Serjt. *contrà*, insisted, that by the practice of this Court an undertaking was necessary, and relied on the case of *French* v. *Coppinger*, 1 *H. Bl.* 216., where the Defendant having obtained a rule for changing the venue from *London* to *Cornwall* on the usual *affidavit*, the Plaintiff shewed cause, and produced an *affidavit*, stating that the action was for money lent in *London*, but the Court refused to bring back the venue, without an undertaking to give material evidence in *London*.

Onslow Serjt. *amicus curiæ*, mentioned the case of *Roland* v. *Knapp*, *Hill.* 41 *Geo.* 3. in this Court, where the Defendant, in

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an action for words, having obtained a rule *nisi* for changing the venue from *London* to *Berkshire* on the usual *affidavit*, the Plaintiff produced an *affidavit*, stating that the action was commenced for words spoken in *Oxfordshire* as well as *Berkshire*, and the Court, after some consideration, held, that notwithstanding the practice of the King's Bench, the practice of this Court required that the Plaintiff should undertake to give material evidence in the county where he had laid the venue.

Cur. adv. vult.

Lord ALVANLEY Ch. J. now said. The Defendant in this case having moved to change the venue, on the usual *affidavit* that the whole cause of action arose in *Kent*, and not elsewhere, the Plaintiff does not oppose this application in the usual way, by undertaking to give material evidence in the county where the action was brought, but meets the *affidavit* of the Defendant by an *affidavit* that the whole cause of action, so far from arising in *Kent*, arose for goods sold and delivered in *Surry*. The question is whether this *affidavit* be a sufficient answer to the Defendant's application? It has been decided by the Court of King's Bench, that if a Defendant apply to change the venue on the usual *affidavit*, it is a sufficient answer to such application, for the Plaintiff to shew that the cause of action arose in more counties than one, though he will not undertake to give material evidence in the county where the action is laid. The case of *Calliand* v. *Champion* is directly to this effect. It was said, however, that whatever the practice of the King's Bench might be, yet that the practice of this Court is otherwise: and two cases have been mentioned, namely, *French* v. *Coppinger*, and *Roland* v. *Knapp*. The former of these cases, however, proves nothing more than this; that when the Plaintiff resists the Defendant's application to change the venue, by insisting that the cause of action arose in the county where he has laid it, the Court will not permit him to do so merely by *affidavit*, but will require from him an undertaking to give material evidence in that county. The other case, though it certainly has more application to the point in dispute, only establishes that applications to change the venue are entirely subject to the discretion of the Court, who will make such rules as may be found best adapted to the attainment of justice. On looking into the papers in that case, I perceive that the application was made in an issuable

term, and that although the Court did not allow the venue to remain where it was originally laid, yet that they did not permit the Defendant to carry it into *Berkſhire* according to the terms of his application; but by a ſort of compromiſe, directed that it ſhould be carried into *Oxfordſhire*, it appearing that the words were ſpoken at two places very near to each other, *viz. Abingdon* and *Oxford*. In that caſe, therefore, the Plaintiff was enabled to obtain his judgment as ſoon as if the cauſe had been tried in *London*. If any inconvenience would be occaſioned in this caſe by the trial of the cauſe in *London*, we might perhaps be induced to purſue the ſame courſe which was adopted in *Roland* v. *Knapp*; but here the whole cauſe of action having ariſen at *Rotherhithe*, the convenience of both parties requires that the cauſe ſhould be tried in *London*. Let us conſider the ground of theſe applications to the Court. The ſtatute of the 4 *H.* 4. *c.* 18. directs, that all attornies ſhall ſwear to make no ſuit in a foreign county; and great jealouſy prevailed at common law reſpecting the trial of cauſes except by a jury *de vicineto*. But all that is now at an end with reſpect to tranſitory actions, and the Courts hold themſelves at liberty to permit a plaintiff to bring his action wherever he thinks proper, under certain reſtraints. If it appear that the whole cauſe of action aroſe in one county, the Defendant is allowed of courſe to remove the venue into that county; and if the cauſe of action aroſe in more counties than one, though the Defendant has no right to remove the venue of courſe into either of thoſe counties, yet if juſtice can be better obtained by a trial in one of thoſe counties than in the county where the Plaintiff has brought his action, the Court may permit the venue to be removed into either of thoſe counties. If the practice of this Court had been otherwiſe, I ſhould certainly have followed it in the deciſion of this caſe, but I ſhould have inclined for the future, to render the practice of both the courts uniform. At preſent, however, no diſcordancy appears: and as it has been ſworn that the whole cauſe of action did not ariſe in the county of *Kent*, we think that ſufficient cauſe has been ſhewn why the venue ſhould remain where it has been laid.

Per Curiam, Rule diſcharged.

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Delivery of goods by the vendor on behalf of the vendee to a carrier not named by the vendee, is a delivery to the vendee. If goods be bought to be paid for by a bill at two months, and the vendor accordingly draw upon the vendee for the value, who refuses to accept, *semb* that the vendee cannot be sued in an action for goods sold and delivered, but upon the special contract only. But certainly he cannot be sued in that form of action till after the expiration of the two months.

THIS was an action for goods sold and delivered. At the trial before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after last *Trinity* term, it appeared that on the 10th of *August* 1802, the goods in question were purchased by the Defendant of the Plaintiff at *Manchester*, to be paid for by a bill at two months; that a bill was accordingly drawn upon the Defendant for the amount of the goods, and tendered for acceptance on the 27th of *August*, which was refused, the Defendant declining to accept any bill except a bill at three months, and that not until after the goods should have arrived. The goods were delivered by the Plaintiff at the common waggon office a few days after the receipt of the order, but did not arrive in *London* until the 9th of *October*. The writ was sued out on the 6th of *September*. The jury found a verdict for the Plaintiff, but liberty was reserved to the Defendant to move that this verdict might be set aside, and a nonsuit entered.

Accordingly a rule *nisi* for that purpose having been obtained on a former day,

Shepherd Serjt. now shewed cause. Two objections are made to the Plaintiff's recovery; first, that the Defendant never received the goods; and, secondly, that under the special agreement entered into between the parties, the Defendant was not liable to be sued as for goods sold and delivered, at least until after the expiration of the two months. With respect to the first objection, a delivery to a carrier is in law a delivery to the vendee, and after such delivery the goods remain at the risk of the latter, the carrier being considered as his servant; though an exception to this general rule arises when by special contract the vendor is to pay for the carriage of the goods. [Here *the Court* intimated an opinion that a delivery to the carrier was a delivery to the Defendant, and that if it were not for the special agreement, the Plaintiff would be entitled to recover.] Secondly, the agreement between the Plaintiff and the Defendant was, that the latter should accept a bill at two months in payment of the goods: it was therefore a sale of the goods, with a condition annexed that a bill should be accepted. If a man receive a bill at two months from a vendee in payment of goods sold, and the drawer refuse to accept it, the vendor may immediately

mediately bring an action againſt the drawer upon the bill. This was determined in *Milford* v. *Mayor*, *Doug.* 55.; and the ſame point had been before ruled in *Bright* v. *Purrier*, *Bull. N. P.* 269. *Ed.* 2. The principle upon which thoſe caſes proceeded was, that there was a condition annexed to the bill that it ſhould be accepted, on the failure of which condition the holder was entitled to ſue the drawer upon the bill. So in this caſe, the Defendant not having performed the condition annexed to the contract of ſale, the Plaintiff is entitled to ſue him for goods ſold and delivered. In *Stedman* v. *Gooch*, *Eſp. N. P. Caſ.* vol. 1. p. 5. Lord *Kenyon* ruled, that though a creditor who takes a bill payable at a future day cannot commence an action for the original debt until that period has expired, yet that if the bill be of no value, as if it be drawn on a perſon who has no effects of the drawer, the creditor may treat it as waſte paper, and reſort to his original demand. If then a creditor may under ſuch circumſtances conſider a note as waſte paper, and reſort to his original demand, why may not a vendor who has agreed to take in payment an acceptance at two months, and who is refuſed ſuch acceptance, reſort to his demand for the price of the goods ſold and delivered?

Bayley and *Lens* Serjts. in ſupport of the rule. Although the Plaintiff in this caſe might have maintained an action on the ſpecial contract before the expiration of the two months, he was not entitled to ſue as for goods ſold and delivered. The contract entered into by the Defendant was to purchaſe goods of the Defendant, to be paid for by a bill at two months. There was no contract to pay for the goods in any other way. It was not a ready-money contract, with time given for the payment, but a contract for a ſpecial payment; and there was no other ground of action than the Defendant's refuſal to accept the bill. It is true, that the holder of a bill may maintain an action againſt the drawer, if acceptance be refuſed before the expiration of the time mentioned in the bill; but in ſuch caſe the action is a ſpecial action, for the bill itſelf is a ſpecial contract, whereby the drawer undertakes that the bill ſhall be accepted and paid when due. On refuſal of the drawer to accept there is a breach of the contract, and conſequently an immediate right of action accrues. The caſe of *Stedman* v. *Gooch* is perfectly diſtinguiſhable from the preſent. It was no part of the original contract between the parties in that caſe that the debt ſhould be paid by the bills of exchange in queſtion,

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but they were given in discharge of a pre-existing debt; and when they proved to be of no value, Lord *Kenyon* thought that the original debt revived. It has been clearly decided by the cases of *Weston* v. *Downes*, *Doug.* 23. *Power* v. *Wells*, *Cowp.* 818, and Dr. *Crompton*'s case, cited 1 *T. R.* 136, that, so long as a special contract remains open, a party cannot resort to his remedy upon the general counts. In the case of *Hulle* v. *Heightman*, 2 *East*, 145, where a seaman had contracted for wages, with a stipulation that he should not be paid till the end of the voyage, and before the end of the voyage was wrongfully discharged by the captain, the Court held, that he could not maintain a general *indebitatus assumpsit* for wages *pro ratâ*. The late case of *Mussen* v. *Price*, 4 *East*, 147, is precisely in point. With respect to the delivery, it may be observed, that in the case of *Vayle* v. *Bayle*, *Cowp.* 294, it seems to have been taken for granted, that if the vendee had not pointed out the particular mode of conveyance he would not have been liable to the risk while the goods were in the hands of the carrier, and that in *Dawes* v. *Peck*, 8 *T. R.* 330, where it was determined that the action against the carrier must be brought in the name of the consignee, the circumstance of the consignee having appointed the carrier was mainly relied on.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord ALVANLEY Ch. J. who (after stating the case) proceeded thus: The first objection in this case is, that the delivery of the goods to the carrier was no delivery to the person who ordered them, and therefore in that point of view this action was commenced too soon, the writ having been sued out before the arrival of the goods in *London*. When this point was first mentioned I was surprised, for it appeared to me to be a proposition as well settled as any in the law, that if a tradesman order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier it operates as a delivery to the purchaser; the whole property immediately vests in him; he alone can bring an action for any injury done to the goods; and if any accident happen to the goods it is at his risk. The only exception to the purchaser's right over the goods is, that the vendor, in case of the former becoming insolvent, may stop them *in transitu*. On this part of the case, therefore, the Court never has entertained any doubt. The principal difficulty arises

from

from the special assignment entered into by the parties, and from the argument, that the Plaintiff is premature in his action for goods sold and delivered before the expiration of the two months. I was inclined at first to hope that we might hold the Plaintiff at liberty to recover on this count, as if there had been no special agreement. If goods be sold and delivered without any special agreement, the law implies a general undertaking to pay for the goods, on which an *indebitatus assumpsit* will lie. It appeared to me, that if the special agreement in this case could be considered as a collateral agreement, the Plaintiff might still be entitled to recover on the general counts; for, if the transaction between the parties could be considered as a contract for the sale of goods, with this condition, that if the purchaser would give a bill at two months he should have two months' credit; then, as the condition had not been complied with, the Plaintiff might be remitted to his original right of action for goods sold and delivered. All the cases cited are of this sort. In *Stedman* v. *Gooch* there was an antecedent debt due from the Defendant to the Plaintiff before the latter received the promissory notes, which proved of no value. Before the transaction respecting the notes took place there was a complete subsisting contract, under which the Defendant was bound to pay immediately; after this he obtained further time on giving the promissory notes, and as the condition on which the time was given was not performed, in consequence of the notes turning out to be of no value, Lord *Kenyon* thought that the Plaintiff was entitled to maintain his action for goods sold and delivered. The cases of *Puckford* v. *Maxwell*, 6 *T. R.* 52, and *Owenson* v. *Morse*, 7 *T. R.* 64, are of the same species. It appeared to me that the conduct of the Defendant might perhaps be considered in the nature of a fraud. If a man prevail upon another to deliver goods to him upon an undertaking to do something else as a satisfaction for the price of the goods, and afterwards refuse to perform his part of the agreement, there seems to be no injustice in holding, that he has repudiated the contract by refusing to comply with its conditions, and that the law may infer an undertaking to pay for the goods which he has received; and certainly considerable inconvenience may arise from the contrary doctrine; for, if a vendor be bound to bring an action on the special undertaking, his remedy will not be so effectual as if he bring his action for goods sold and delivered, because in such case the Defendant cannot be

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holden to bail without a Judge's order. These were the impressions on my mind when the point was first started, and I should have been glad if the law would have warranted me in giving them effect. Indeed, the same arguments seem to have weighed with Lord *Ellenborough*, in the case of *Mussom* v. *Price*, who accordingly there delivered his opinion in favour of the Plaintiff. But the decision in that case governs the present, the majority of the Judges having there determined, that the action could not be commenced before the expiration of the period which the bills had to run. Whatever doubts therefore I may have entertained respecting the rule which ought to be adopted, I cannot set up my judgment against a decision of the Court of *King's Bench*, which is precisely in point. It was said, indeed, in that case, that at the expiration of the period which the bills had to run an action of *indebitatus assumpsit* would lie. But I should recommend to any person bringing his action under such circumstances, to declare on the special agreement as well as on the general count, for I entertain great doubts whether, even at the end of the two months, an *indebitatus assumpsit* will lie, if it does not lie before the expiration of that period. If this matter had been *res integra*, I should have agreed in the opinion delivered by Lord *Ellenborough*, that the action was properly conceived, but the law being once settled, no material inconvenience can result from adhering to the rule which has been laid down. My Brother *Rooke*, who ruled otherwise at *Lancaster*, is perfectly satisfied with the decision of the Court of *King's Bench*; and my Brother *Chambre*, previous to the case of *Mussom* v. *Price*, had ruled the same point at *York* in the same way as the Court of *King's Bench* have decided. My two Brothers therefore both now concur in that opinion, and we all think that a nonsuit must be entered.

Rule absolute.

ROGERS *v.* Sir GERVAS CLIFTON, Bart. *Nov.* 26th.

THIS was an action on the caſe. The firſt count of the declaration ſtated, that the Plaintiff, before the committing the grievances, &c. had been retained and employed in the ſervice of the Defendant as his butler and ſervant, and in that capacity had behaved with due integrity, good temper, activity, and civility, and never was ſuſpected to have been bad tempered, lazy, or impertinent, by means whereof the Plaintiff had not only gained the good opinion of his neighbours, but had ſupported himſelf, and would thereafter have ſupported himſelf by his induſtry in the ſervice of his maſter, had not ſuch grievances been committed as thereinafter mentioned; and that the Plaintiff at the time of ſuch grievances had quitted the Defendant's ſervice, and had been recommended to, and was likely to be retained and employed by and in, the ſervice of one *William Hand*, clerk, for certain wages to be paid to him; yet that the Defendant well knowing, &c. but contriving, &c. to injure the Plaintiff in his character, and to bring him into public ſcandal among his neighbours, and particularly with the ſaid *William Hand*, and to cauſe it to be ſuſpected and believed that the Plaintiff was not fit to be employed as a ſervant, and that he was bad tempered, and a lazy and impertinent fellow, and thereby to prevent the ſaid *William Hand* from retaining and employing him in his ſervice, as he otherwiſe might and would have done, and to vex, haraſs, &c. falſely and maliciouſly did compoſe and publiſh a certain falſe and ſcandalous libel of and concerning the ſaid Plaintiff as ſuch ſervant as aforeſaid, containing amongſt other things certain falſe and malicious matter concerning him as ſuch ſervant as aforeſaid, in ſubſtance as follow, that is to ſay, "He" (meaning the Plaintiff) "is a bad-tempered, lazy, impertinent fellow;" thereby meaning that the Plaintiff was not fit to be employed in the capacity of a ſervant. The ſecond count was alſo for publiſhing a libel containing the following words, "that he, the Defendant, wiſhed he had never taken the Plaintiff into his houſe, as he was a bad-tempered, lazy, and impertinent fellow." The third count ſtated, that before the committing the grievances, &c. the Plaintiff had been retained and employed by and in the ſervice of one Mr. *Holland* as his ſervant,

Although a maſter be not in general bound to prove the truth of a character given by him to a perſon applying for the character of his ſervant, yet if he officiouſly ſtate any trivial miſconduct of the ſervant to a former maſter in order to prevent him giving a ſecond character, and then himſelf upon application for a character give the ſervant a bad character, the truth of which he is not able to prove, the jury may from theſe circumſtances infer malice againſt the maſter in an action againſt him by the ſervant.

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vant, and had quitted ſuch ſervice; and the Plaintiff, from the time of the committing ſuch grievances, being out of place and unemployed, the ſaid *Holland* would, had not the grievances thereinafter mentioned been committed, have given to any perſon applying to the ſaid *Holland* for a character of the Plaintiff, ſuch a true and correct character as might have induced ſuch perſons to have retained and employed the Plaintiff as a ſervant; yet the Defendant knowing, &c. but contriving to injure the Plaintiff, and to induce the ſaid *Holland* not to give him ſuch a character as aforeſaid, and thereby to impoveriſh and wholly ruin the Plaintiff, on the day aforeſaid ſent to deſire the ſaid *Holland* not to give the Plaintiff a character, for that he was a lazy, impertinent fellow; by means of which premiſes the ſaid *Holland* was induced not to give, and to refuſe to give the Plaintiff a character; in conſequence whereof the Plaintiff was unable for a great length of time, to wit, &c. to induce or prevail upon any perſon to retain or employ him as a ſervant, and was thereby greatly impoveriſhed and injured, &c. to his damage of 500 *l.*

The Defendant pleaded not guilty.

This cauſe came on to be tried before Lord *Alvanley*, Ch. J. at the *Guildhall* Sittings after laſt *Trinity* term, when the following facts appeared in evidence. The Plaintiff having been hired as a ſervant by the Defendant, lived about ſix months in his ſervice, when the latter turned him away without giving him a month's warning, in conſequence whereof the Plaintiff, conceiving himſelf entitled to a month's wages, refuſed to quit the ſervice without being paid that ſum. On this refuſal the Defendant procured an officer from the police office to put the Plaintiff out of the houſe, and employed his attorney to ſettle his wages with him. Immediately after this the Defendant, who was going into the country, called on Mr. *Holland*, with whom the Plaintiff had previouſly lived, to inform him that the Plaintiff had behaved in an impertinent and ſcandalous manner; that he the Defendant had diſcharged him from his ſervice, when the Plaintiff refuſed to go without a month's wages; and he therefore deſired Mr. *Holland* not to give him another character. While the Defendant was in the country the Plaintiff offered himſelf to a Mr. *Hand*, ſtating that he had lately lived with the Defendant, upon which Mr. *Hand* wrote to the Defendant for a character, and received the following anſwer:

" Sir,

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" Sir,

" In anſwer to yours which came to hand yeſterday, beg leave to acquaint you that *Thomas Rogers* did not live with me ſix months, as he has told you, and wiſh I had never taken him into my houſe, as he is a bad tempered, lazy, impertinent fellow, and has given me a great deal of trouble, as I was obliged to ſend an officer from the *Marlbro'-ſtreet* police office to put him and his things out of my houſe, and alſo to employ Mr. *Barnet* my attorney of *Soho Square* to ſettle his wages, as I look upon it he will take any advantage he can.

" I am, Sir, your moſt obedient humble ſervant,

" *Gervas Clifton.*"

Upon receipt of this letter Mr. *Hand* refuſed to take the Plaintiff into his ſervice. It appeared that Mr. *Holland* never was applied to for a character of the Plaintiff after the communication made to him by the Defendant, and Mr. *Holland* ſtated, that without ſuch communication he ſhould have declined giving another character to the Plaintiff. The Plaintiff alſo proved by ſervants of the family, that while in the Defendant's ſervice he had conducted himſelf well and that no complaints of the nature aſcribed to him in the Defendant's letter had all that time exiſted. The jury found a verdict for the Plaintiff with 20*l.* damages, but liberty was reſerved to the Defendant to move to have a nonſuit entered.

Accordingly a rule *niſi* having been obtained on a former day,

Shepherd and *Williams* Serjts. now ſhewed cauſe. It may be admitted as a general propoſition, that where words are ſpoken or written by a maſter of a ſervant, or communicated in confidence, no action can be maintained for ſuch words, though, under other circumſtances, the words would be actionable; for in ſuch caſes the ſituation of the party ſpeaking or writing rebuts the inference of malice. To this extent only proceed the caſes of *Edmonſon* v. *Stevenſon*, *Bull. N. P.* p. 8, and *Weatherſton* v. *Hawkins*, 1 *T. R.* 110. But if it appear, from the circumſtances of the caſe, that the words were maliciouſly ſpoken or written, then an action lies againſt the maſter; for then he does not fall within the principle of the exception, which exempts a maſter from the ſame liabilities as other perſons, on account of the occaſion which induces them to ſpeak or write reſpecting the character of ſervants, and the motives which are ſuffered to influence their conduct. Had nothing appeared in

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this caſe but the anſwer of the Defendant to Mr. *Hand*, it might have been inferred, that the Defendant wrote the letter *quà* maſter; but the motives which dictated that letter may plainly be collected from the other circumſtances of the caſe. It was not only proved that the character given by the Defendant was falſe, but that the Defendant, having had an altercation with the Plaintiff reſpecting his wages at parting, voluntarily, and without any obligation impoſed upon him as maſter, went to Mr. *Holland* and gave the ſame character of the Plaintiff as he afterwards gave to Mr. *Hand*. This character, thus voluntarily and officiouſly given to Mr. *Holland*, muſt be conſidered as malicious; from whence it may be inferred that the character afterwards given to Mr. *Hand* was dictated by the ſame motives. There was therefore ſufficient evidence from which the jury might infer malice in the Plaintiff's conduct.

Lens Serjt. in ſupport of the rule. The inference attempted to be drawn from the circumſtance of the Defendant going to Mr. *Holland*, and informing him of the conduct of the Plaintiff, might have been fairly drawn if any interval of time had elapſed between the miſconduct of the Plaintiff and the communication of it to Mr. *Holland*. But that communication immediately followed the Plaintiff's miſconduct: no inference of malice therefore ought to be raiſed from the Defendant having done what he probably felt it his duty to do, and which he did not defer till the moment when the Plaintiff was likely to get a character from Mr. *Holland*. If a maſter be juſtified in preventing a ſervant from getting a new place by ſtating his real character, and is not bound to prove the truth of his aſſertions, it ſhould ſeem that upon principle the ſame juſtification ought to extend to his deſiring the former maſter of ſuch ſervant not to give him a ſecond character. The ſame principle of duty influences the maſter upon both occaſions; and, in fact, he only purſues the ſame end by different means. The only queſtion in both caſes ought to be, Whether what has been ſtated by the maſter has been fairly ſtated? and in both caſes the ſervant ought to be called upon to ſhew that the ſtatement made againſt him was unfair, ſince the preſumption is, that communications of this ſort are made by maſters as a warning to thoſe to whom they are made, and for the benefit of the public. If, therefore, the Court ſhould be of opinion that the evidence in

this

this caſe was properly ſubmitted to the jury, ſtill it may be contended that the facts do not warrant the jury in having drawn that inference of malice, which can alone ſupport the verdict.

Lord ALVANLEY, Ch. J. I feel great anxiety in this caſe, that the public ſhould not be led into any falſe notions reſpecting the grounds of our deciſion, by any incorrect ſtatement of what paſſes in this place. Indeed, the hand-bill (*a*) which was brought to our notice when the rule now under conſideration was moved for, and the authors of which, had it been regularly before the Court, we ſhould have animadverted upon very ſeverely, increaſes that anxiety which the general importance of the queſtion itſelf to the public is ſufficient to excite. If it were to be underſtood, that whenever a maſter gives a bad character to a ſervant who has quitted his ſervice, he may be forced by the ſervant, in juſtification of ſuch his conduct as a maſter, to prove the particulars which he has ſtated reſpecting the ſervant, it would be impoſſible for any maſter ſo underſtanding the law (at leaſt with any regard to his own ſafety), to give any character but the moſt favourable to a ſervant, and conſequently impoſſible for a ſervant, not entitled to the moſt favourable character, to obtain any new place. In the two caſes of *Edmonſon* v. *Stevenſon* and *Weatherſton* v. *Hawkins*, the law upon this ſubject appears to me to be laid down as clearly as can be wiſhed. Unqueſtionably, the maſter who has given a bad character of a ſervant to perſons enquiring after his character, is not bound to ſubſtantiate by proof what he has ſaid; but it is equally clear that the ſervant may, if he can, prove the character to be falſe; and the queſtion between the maſter and ſervant will always, in ſuch caſe, be, whether what the former has ſpoken reſpecting the latter be malicious and defamatory? In this caſe we are to conſider whether the evidence adduced by the Plaintiff was ſufficient to be left to the jury, and whether it warranted the reſult which they have drawn? [Here his Lordſhip ſtated the evidence.] It appears then that the Defendant diſmiſſed the Plaintiff from his ſervice refuſing to allow him a month's wages, to which the latter conceived he was entitled. In conſequence of ſuch re-

(*a*) When the motion was made for a new trial, a hand-bill was ſtated to the Court, addreſſed to ſervants in general, and publiſhed by the Defendant ſince the trial, in which all the previous proceedings in the cauſe were ſet forth, the importance of the caſe to all ſervants ſtated, and a ſubſcription for carrying on the cauſe requeſted.

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ſuſal the Plaintiff would not, until compelled by force, quit the Defendant's houſe; a conduct not juſtifiable, ſince, however unpleaſant the remedy might be, the Plaintiff's proper mode of recovering what he conceived to be due to him was by an action. This, however, was the only act of impertinence proved againſt the Plaintiff; and if in fact it was the only act of impertinence committed by him during his ſtay in the Plaintiff's ſervice, I do not think the Defendant was, by that act alone, called upon to ſeek out Mr. *Holland*, and officiouſly ſtate to him what he did. I do not mean to intimate, that if a ſervant were ſtrongly ſuſpected of having committed a felony while in his maſter's ſervice, that maſter is not at liberty to warn others from taking him into their ſervice, for it is the duty of every perſon to guard the public againſt admitting ſuch ſervants into their houſes. But in this caſe the offence imputed to the Plaintiff appears to have been of a trivial nature. It is material alſo to obſerve, that when the Plaintiff in this caſe applied to Mr. *Hand* for his place, and referred him to the Defendant, he did not tell him that the Defendant would give him a good character; had he done ſo, I ſhould have ſuſpected that he wiſhed to lay a trap for the Defendant, and procure evidence to ſupport this action; in ſuch caſe I ſhould hold a party not at liberty to aſcribe the character given by his maſter to malice, when he had only drawn from him that which he had a right to expect. It has been argued indeed in this caſe, that the letter written by the Defendant to Mr. *Hand*, in its terms implied that the Plaintiff had been carried to the Police-office upon a criminal charge, but I do not think any ſuch inference could fairly be drawn from the letter. *Weatherſton* v. *Hawkins* was the caſe of a letter written by a friend of the Plaintiff's; yet the Court looked to ſee if it was dictated by malice, and being of opinion that it was not, held the action not maintainable. In this caſe, I think I ſhould have grievouſly invaded the province of a jury, if I had not left it to them to ſay whether, conſidering all the circumſtances of the caſe, the conduct of the Defendant was not malicious. Poſſibly had I been on the jury, I ſhould not have concurred in finding the verdict which they have done; but ſtill I do not think that we are now at liberty to diſturb their verdict, thinking, as I do, that the evidence was properly left to them. At the ſame time, I wiſh it to be underſtood as my opinion,

that maſters ought to be protected as much as poſſible if they honeſtly diſcharge their duty in ſpeaking of the characters of thoſe ſervants who have quitted their ſervice.

ROOKE J. I am of the ſame opinion. It does not appear to me that ſufficient grounds have been diſcloſed to induce us to diſturb the verdict in this caſe. But I wiſh to have it underſtood as my opinion, that a maſter may at any time, whether aſked or not, ſpeak of the character of his ſervant, provided that he ſpeak in the honeſty of his heart, and that an action cannot be maintained againſt him for ſo doing. In ſupport of this opinion the caſe of *Bell* v. *Thatcher*, *Vent.* 275, may be referred to, where Sir *Matthew Hale* ſays, if ſuch actions could be ſupported a man ſhould not ſpeak diſparagingly of a cook or a groom but an action would be brought. At the ſame time maſters are not warranted in ſpeaking ill of their ſervants from heat or paſſion. If this caſe reſted merely on the letter written to Mr. *Hand* by the Defendant, I ſhould be of opinion that the action was not maintainable. But it appears that the Plaintiff and Defendant parted in anger with each other, and that thereupon the latter ſent officiouſly to Mr. *Holland*, to ſtate to him what he thought of the Plaintiff, and to prevent Mr. *Holland* from giving him a character. I agree with my Lord, that the Defendant would have been warranted in communicating any thing of a criminal nature done by the Plaintiff which had come to his knowledge. But the charge made againſt the Plaintiff, though not of a very grievous nature, yet was juſt ſufficient to prevent his getting a new place, and was ſuch as convinces me that it was made in conſequence of the anger conceived againſt him in the Defendant's mind. The caſe therefore ſtands thus; the Plaintiff and Defendant parted in heat and anger with each other, and the latter has given the former a character, which, from the evidence in the cauſe, he does not appear to have been warranted in giving him.

CHAMBRE J. I own I cannot entertain a doubt reſpecting the line of conduct which the Court ought to purſue upon this occaſion. I not only think we are bound not to diſturb this verdict, but I will add, that if I had been upon the jury I ſhould have concurred in the verdict. Nor do I think we can at all take into our conſideration any paper which may have been ſince publiſhed by the Plaintiff; though, if it had been publiſhed before the trial, and had influenced the minds of the jury, that would have been

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a ſufficient reaſon for ſetting aſide the verdict, and puniſhing the parties concerned in ſuch publication. On the ſecond count of the declaration in this caſe no ſpecial damage is proved or laid; I conſider the caſe therefore as reſting entirely on the firſt count, and if the Plaintiff chooſes to enter up his judgment generally, he will run the riſk of having it ſet aſide. We need not conſider whether the words made uſe of by the Plaintiff, when giving the character of the Defendant, are in themſelves actionable or not; for it is alleged in the firſt count, and was proved at the trial, that the Plaintiff, in his letter to Mr. *Hand*, called the Defendant a lazy, impertinent fellow, and that Mr. *Hand*, in conſequence, refuſed to take him into his ſervice. I take the law to be well ſettled, that where a maſter is applied to for the character of a ſervant, the former is not called upon in an action to prove the truth of any aſperſions thrown out by him againſt the latter, but that it lies upon the ſervant to prove the falſehood of the aſperſions thrown out againſt him. In ſuch caſe the maſter is juſtified, unleſs the ſervant prove expreſs malice in the act of the former. Beſides the caſes cited at the bar, I will refer to the caſe of *Lowry* v. *Aikenhead, et Ux. Mich.* 8 *Geo.* 3. before Lord *Mansfield.* In that caſe the rule laid down by Lord *Mansfield* was, that where a perſon intending to hire a ſervant applies to his former maſter for a character, the maſter is not bound to prove the truth of the character which he gives; for what he ſpeaks of the ſervant he does not ſpeak officiouſly, but only diſcloſes that which reſts in his own knowledge alone; but, that where a maſter ſpeaks ill of a ſervant who has quitted his place, without any previous application having been made to him, there he muſt plead and prove the truth of the character in juſtification. Indeed the qualification of the rule may be collected from the words uſed by Mr. Juſtice *Buller* in his law of *Niſi Prius*, when ſpeaking of the caſe of *Edmonſon* v. *Stevenſon*; for he lays it down, that where words are ſpoken in confidence, and without malice, no action lies; he then refers to the caſe of *Edmonſon* v. *Stevenſon*, where the words being ſpoken of a ſervant by her miſtreſs on application for the character of the ſervant, it was held by Lord *Mansfield*, that malice ſhould not be implied from the occaſion of ſpeaking, but ſhould be directly proved. And the ſame law had been acted upon in the caſe of *Haver* v. *Dawſon*, *Bull. N. P.* p. 8, where an action having been

brought

brought againſt a man for warning his friend reſpecting the circumſtances of the Plaintiff, *Pratt* Ch. J. directed the jury, that though the words were otherwiſe actionable, yet, if they ſhould be of opinion that they were not ſpoken out of malice, but in confidence and friendſhip, and by way of warning, they ſhould find the Defendant not guilty; which they did. So in this caſe, if Sir *Gervas Clifton* had been intimate with Mr. *Holland*, and had gone to him in confidence to communicate what had paſſed between himſelf and the Plaintiff, he would have redeemed himſelf from the imputation of malice. But that does not appear to have been the caſe here. What is there in the nature of the charge adduced againſt the Plaintiff by Sir *Gervas Clifton* which required ſuch officious interference on his part? Had he been robbed by the Plaintiff, it would have been very reaſonable that he ſhould go, even to a mere ſtranger, to tell him what in common honeſty he would have been bound to tell, and to warn him againſt taking the Plaintiff into his houſe. A caſe of that kind would have excuſed the Defendant; but here the charge of lazineſs and impertinence was of too ſlight a nature to warrant the officious interference of Sir *Gervas Clifton*, and indeed no great harm would have enſued from the Plaintiff's obtaining another place. Had the caſe reſted upon the mere circumſtance of the letter written by the Defendant to Mr. *Hand*, the Plaintiff could not have ſupported his action without proving malice in Sir *Gervas Clifton*. But it does not reſt on that alone; he had previouſly told the ſame things to Mr. *Holland* which he wrote to Mr. *Hand*, and he had deſired the former not to give the Plaintiff a character. I think the inducement to Sir *Gervas Clifton* to do all this was the quarrel which had taken place between himſelf and the Plaintiff at parting. Conſidering therefore, as I do, the quarrel as the real cauſe of the charge made againſt the Plaintiff, and ſeeing ſo much officious interference on the part of the Defendant, I am quite clear we ought not to grant a new trial.

Rule diſcharged.

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Dec. 1ſt.

The KING *v.* TAYLOR.

If a ſervant receive money for his maſter in the county of *A.*, and being called upon to account for it in the county of *B.*, there deny the receipt of it, he may be indicted for the embezzlement in the latter county.

THIS was an indictment in the county of *Middleſex*, againſt the priſoner *William Taylor*, for, that he, being the ſervant of one *James Barker*, did receive and take into his cuſtody certain monies, to wit ten ſhillings, for and on account of his ſaid maſter; and having ſo received and taken into his poſſeſſion the ſaid ſum of money, for and on account of his ſaid maſter, he the ſaid *W. T.* fraudulently and feloniouſly did embezzle and ſecrete the ſame, and ſo did ſteal from his ſaid maſter the ſaid ſum of ten ſhillings, the money of the ſaid *Jas. Barker*, for whoſe uſe and on whoſe account the ſame was delivered to, and paid into the poſſeſſion of the ſaid *W. T.* againſt the form of the ſtatute.

At the trial at the *Old Bailey*, before *Heath* J. and *Thomſon* B., it appeared that the proſecutor was a fiſhmonger in *Drury-lane*, and the priſoner was his ſervant; that on the 27th of *Auguſt* the priſoner was ſent with 100 herrings to *Croſs-ſtreet*, *Blackfriars-road*, in the county of *Surry*, to a Mrs. *Stevens*, who had agreed to buy them for ten ſhillings, which ſhe was to ſend back by the priſoner, and the proſecutor told the priſoner he was to receive ten ſhillings for the herrings; that he was ſent with them about ſix o'clock in the evening, and delivered them to Mrs. *Stevens*, who paid him ten ſhillings for them, and the priſoner returned about eight o'clock, when his maſter aſked him if he had brought the money; that the priſoner ſaid, No, for that Mrs. *Stevens* had not paid him; that he never accounted for the money; that the proſecutor paid him his weekly wages (it being on a *Saturday*), and that the priſoner was to have returned on *Monday* as uſual, but did not. It was contended on the part of the priſoner, that he was only liable to be indicted in the county of *Surry*, where the money was received. The priſoner was found guilty, and the point was reſerved for the opinion of the Judges.

On this day the opinion of the Judges was delivered at the *Old Bailey*, by

Lord ALVANLEY Ch. J. At the trial it was contended, that under the circumſtances of this caſe the priſoner could only be indicted in the county of *Surry*. The priſoner, however, was found guilty,

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guilty, and the queſtion was reſerved for the conſideration of the Judges. They have conſidered the queſtion, and are unanimouſly of opinion, that the priſoner has been rightly convicted. This is the ſecond caſe which has ariſen upon the 39 *Geo.* 3 *c.* 85., in which doubts have occurred reſpecting the place where the offence ought to be charged to have been committed. The firſt was the caſe of *The King* v. *Hobſon*, tried before Mr. Juſtice *Chambre*, at *Shrewſbury*, in the county of *Salop*, which is reported in 1 *Eaſt's P. C. Addenda*, p. xxiv. In that caſe the priſoner had received the money in the county of *Salop*, and denied the receipt of it to his maſter in the county of *Stafford*, and when he afterwards went into the county of *Salop* perſiſted in that denial. The reſult of the opinion of the Judges, as ſtated in the report, was this: "Moſt of them thought that, as in the caſe of larceny at common law, ſo in this, where the ſtatute declared the offence to be of the ſame kind, the ſubſequent conduct of the priſoner in not accounting to his maſter, and denying the receipt of the money, was evidence to ſhew that the original taking was with intent to ſecrete and embezzle, and ſo to ſteal within the meaning of the ſtatute; and the more ſo as the act of ſecreting was a negative act. And ſome conſidered that the offence was triable in either county, as referable to the original taking in the one, and the not accounting but denying the receipt when called upon in the other." If any doubts could ariſe in that caſe, they certainly do not occur here. In that caſe there was ſtrong evidence that the priſoner began to determine to embezzle in the county of *Salop*, and there was likewiſe a clear execution of that determination in that county, though, it was ſaid, the not accounting aroſe in the county of *Stafford*, until which it might be argued that the act of embezzling was not complete. The Judges, however, were of opinion, that there was ſufficient evidence of a beginning to embezzle in the county of *Salop* to make the offence triable in that county. In the preſent caſe no doubt can be entertained. The priſoner being ſent over *Blackfriar's-bridge* into the county of *Surry*, there received ten ſhillings for his maſter. The receipt of that money was perfectly legal, and there was no evidence that he ever came to the determination of appropriating the money to his own uſe until after he had returned into the county of *Middleſex*. It was not proved that the money ever was embezzled until the priſoner was in the

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county of *Middlesex*. In cases of this sort the nature of the thing embezzled ought not to be laid out of the question. The receipt of money is not like the receipt of an individual thing, where the receipt may be attended with circumstances which plainly indicate an intention to steal, by shewing an intention in the receiver to appropriate the thing to his own use. Thus, if a servant receive a horse for his master, and sell it before he gets out of the county where he first received it, it might be said that he is guilty of the whole offence in that county. But with respect to money, it is not necessary that the servant should deliver over to his master the identical pieces of money which he receives, if he should have lawful occasion to pay them away. In such a case as this therefore, even if there had been evidence of the prisoner having spent the money on the other side of *Blackfriar's-bridge*, it would not necessarily confine the trial of the offence to the county of *Surry*. But here there is no evidence of any act to bring the prisoner within the statute until he is called upon by his master to account. When called upon by his master to account for the money, the prisoner denied that he had ever received it. This was the first act from which the jury could with certainty say that the prisoner intended to embezzle the money. In this case there was no evidence of the prisoner having done any act to embezzle in the county of *Surry*, nor could the offence be complete, nor the prisoner be guilty within the act, until he refused to account to his master. We are therefore of opinion, that the prisoner was properly indicted in the county of *Middlesex*.

[Mr. Justice *Heath* was absent during the whole of this Term from indisposition.]

END OF MICHAELMAS TERM.

CASES

ARGUED and DETERMINED

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

IN

Hilary Term,

In the Forty-fourth Year of the Reign of GEORGE III.

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HAYNES *v.* BIRKS.

Jan. 27th.

THIS was an action brought againſt the Defendant, as indorſer of a Bill of exchange.

A bill indorſed in blank, and depoſited by the holder with his bankers, became due on *Saturday*, and was preſented for payment about two o'clock on that day. Payment being refuſed, the bill was noted and again preſented between nine and ten in the evening by a notary. On *Monday* the bankers informed the holder that the bill was diſhonoured, who on *Monday* about noon gave notice to the indorſer. The holder lived at *Knightſbridge*, and the indorſer in *Tottenham-Court Road*. Held that this notice was ſufficient to entitle the holder to recover againſt the indorſer.

The cauſe was tried before *Rooke* J. at the *Weſtminſter* Sittings after laſt *Michaelmas* Term, when it appeared that the bill in queſtion, which was indorſed in blank, being due on *Saturday* the 1ſt of *October*, was preſented for payment about two o'clock on that day at the houſe of the acceptor, by a clerk of Meſſrs. *Wilkes* and Co. of the Poultry, the Plaintiff's bankers, in whoſe hands it had been placed by the Plaintiff; that payment being refuſed, the

bill

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bill was noted and again presented between nine and ten in the evening of the same day by a notary, who was informed that the acceptor was in the King's Bench prison; that the bankers on *Monday* the 3d sent the bill to the Plaintiff, informing him that it was dishonoured, who gave notice of the non-payment to the Defendant on *Tuesday* the 4th about noon; that the Plaintiff lived at *Knightsbridge*, and the Defendant in *Tottenham-Court Road*. On this evidence it was objected that the Defendant was discharged for want of notice of the non-payment being given within reasonable time. A verdict was taken for the Plaintiff, with liberty to the Defendant to move that a nonsuit should be entered.

Accordingly, *Best* Serjt. moved for a rule *nisi*. The bill having been dishonoured at two o'clock on *Saturday* the 1st of *October*, notice of the non-payment should have been given to the Defendant on *Monday* the 3d of that month at fartheſt. It was expressly laid down in *Tindall* v. *Brown*, 1 *T. R.* 167, that reasonable time, as applied to bills of exchange, is a question of law; and it has been established by several cases, that where the parties live in the same town, notice must be given on the next day at fartheſt, and where they do not live in the same town, by the next post. In *Tindall* v. *Brown*, the note having been dishonoured on the 5th of *October*, notice given on the 7th was holden to be too late. And in *Nicholson* v. *Gouthitt*, 2 *H. Bl.* 609, the same was holden where the note became due on the 3d of *October*, and notice was not given till the 6th. The bill therefore having been dishonoured on *Saturday* the 1st, and notice not having been given till *Tuesday* the 4th, such notice is out of reasonable time, even considering *Sunday* as no day. It is no answer to this objection that the bankers did not return the bill to the Plaintiff until *Monday* the 3d, for if they have been guilty of neglect, the Plaintiff must seek his remedy against them. The bill having been dishonoured at two o'clock on *Saturday*, it was the duty of the bankers immediately after noting it, to return it to the Plaintiff the same day. The indorser is not to be prejudiced by the circumstance of the holder having put the bill into the hands of his bankers, for in *Peach* v. *Burgess*, *cit.* 1 *T. R.* 407. Lord *Mansfield* said, "it was a strict rule of law that notice must be given, and it must be adhered to in every case. The bankers can only be considered as the agents of the Plaintiff; either therefore they should have given due

due notice to the Defendant, or have returned the bill to the Plaintiff time enough to have enabled him ſo to do. 1804. HAYNES v. BIRKS.

The Court inclined to refuſe a rule to ſhew cauſe, but ſaid they would mention the caſe to the other Judges and intimate their opinion on the next day.

Accordingly, Lord *Alvanley* Ch. J. on the next day ſaid, In this caſe it has been inſiſted for the Defendant, that reaſonable notice was not given to him of non-payment by the acceptor, and two caſes have been cited to ſhew that three days between the non-payment and the notice is too much. It is perfectly true, that in each of thoſe caſes three days did intervene between the non-payment and the notice, but in neither of thoſe caſes is it ſtated, as the fact is in this, that the laſt day of payment was on a *Saturday*. Reaſonable diligence in giving notice according to the courſe and habit of perſons in trade is abſolutely neceſſary, and no excuſe can be accepted if ſuch reaſonable diligence be omitted, unleſs as between the holder and the drawer, where the latter is proved to have had no effects in the hands of the acceptor. We lay entirely out of our conſideration the circumſtance of the acceptor being in the King's Bench priſon, and mean to decide the caſe as if he were ſolvent. It has been argued, that the bankers were the agents of the Plaintiff, and that the Defendant was entitled to the ſame notice as if the bill had remained in the Plaintiff's hands. We have converſed with ſome of the other Judges upon this point, and they agree with us in thinking, that if we were ſo to deal with bills of exchange in the hands of bankers, we ſhould put an end to the practice of employing them to receive payment on the bills of their cuſtomers. As ſoon as the banker is informed of the non-payment of a bill it becomes his buſineſs to acquaint his principal of that circumſtance; and I wiſh to be underſtood to ſay, that if a bill be returned to a banker he is bound to give notice to his principal that very day, if he can do ſo by uſing ordinary diligence. But in this caſe it was impoſſible for the bankers on *Saturday* night to give notice to the Plaintiff, ſince the bill was not preſented by the notary till between nine and ten o'clock. On *Sunday* of courſe they were not bound to do ſo. And on *Monday* they did appriſe the Plaintiff of the non-payment. It does not appear at what time on *Monday* the Plaintiff received the notice. The Plaintiff was not bound to be at home the whole of the day: and ſuppoſing

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him to have returned home late on that day, he was not bound to ſend a ſpecial meſſenger to the Defendant; if he informed the Defendant by the courſe of the poſt it is ſufficient. Certainly he was bound to write by the two-penny poſt on *Monday*, and ſuppoſing him to have done ſo, the Defendant would only receive his letter on *Tueſday*. Now it appears that on *Tueſday* he did receive the notice; and we cannot ſo nicely meaſure the minutes as to conſider whether the preciſe time of the receipt correſponds with the time at which a letter ſent by the poſt on *Monday* night would arrive. The caſe of *Leftley* v. *Mills*, 4 *T. R.* 170, which was mentioned at the bar (*a*), to ſhew that the bankers could not give notice on *Saturday* becauſe the acceptor had the whole of that day to pay the bill, does not ſatisfy me; and it is obſervable that the opinion thrown out by Lord *Kenyon* was not aſſented to by Mr. Juſtice *Buller*. The two caſes cited in ſupport of this application were *Nicholſon* v. *Gouthitt* and *Tindal* v. *Brown*. In the former caſe, though the bill was due on the 3d of *October* it was not preſented till the 6th, though all the parties lived near each other. Lord Chief Juſtice *Eyre* was of opinion that under the circumſtances of that caſe notice might be diſpenſed with. But from that caſe it does not appear that the day on which the bill became due was a *Saturday*, and that it was preſented ſo late as to preclude the poſſibility of giving notice on that day. In *Tindal* v. *Brown* the Court was of opinion, that a whole day had been improperly given. I do not think that any one has a right to complain that the holder of a bill of exchange employs a banker to receive it, nor is there any law which requires notice to be given within any certain fixed time. Notice need not be given with all the diſpatch that can poſſibly be uſed, but it muſt be given with all the diſpatch that can reaſonably be expected.

Heath and *Rooke* Js. concurring,

Beſt Serjt. took nothing by his motion.

(*a*) By *Onſlow* Serjt. who had been Counſel for the Plaintiff at the trial.

JARRET *v.* CREASY.

Jan. 31ſt.

TIME for putting in bail having expired on the 30th of *January*,

Beſt Serjt. on this day (the 31ſt) moved to juſtify.

Shepherd Serjt. oppoſed the juſtification, inſiſting that the Plaintiff was entitled to the coſts of moving for an attachment for which inſtructions had been given.

Beſt urged that the Defendant was at liberty to juſtify bail at any time before the attachment was obtained, that the Plaintiff was ſufficiently apprized by the notice of juſtification of the Defendant's intention to juſtify this day, and that, as the Court never allowed any advantage to be taken of the priority of motion on the ſame day, the inſtructions for the attachment ought not to have been given.

But *The Court* thought the Plaintiff was entitled to the coſts of preparing to move for the attachment, ſince he could not be certain whether the Defendant would proceed upon his notice of juſtification.

Accordingly *Beſt* undertook to pay thoſe coſts, and was allowed to juſtify.

Time for putting in bail expired on the 30th, Defendant on the 31ſt moved to juſtify, purſuant to a notice previouſly given. Held that the Plaintiff was entitled to the coſts of preparing to move for an attachment.

HODGKINSON *v.* SNIBSON.

Feb. 3d.

BAYLEY Serjt. moved for a rule to ſhew cauſe why the proceedings in an action of replevin ſhould not be ſtayed on payment of coſts by the Defendant.

The declaration was general, and did not aſſign any ſpecial damage. The Defendant made cognizance as bailiff of *Paul Joddrell* Eſq. lord of the manor of *Workſworth*, and acknowledged diſtraining on the Plaintiff as conſtable of the townſhip of *Gromford*, for palfrey rent, to which ſeveral pleas in bar were pleaded.

The Court thought that both parties were actors in replevin, and that the Plaintiff had a right to his judgment.

Bayley took nothing by his motion.

The Court will not ſtay proceedings in replevin upon payment of coſts on the application of the Defendant.

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Feb. 3d.

CHALMERS and Another *v* BELL.

If a *Swediſh* Ship be inſured at and from her loading port in the *Eaſt Indies* to *Gottenburgh*, and part of the cargo be laden in a *Britiſh* port in the *Eaſt Indies*, the inſured cannot recover, the voyage being in contravention of the navigation laws.

THIS was an action on a policy of inſurance on goods by the ſhip *Reſolution*, warranted *Swediſh* ſhip and property, at and from the ſhip's loading port or ports in the *Eaſt Indies*, *Perſia*, *China*, or elſewhere beyond the *Cape of Good Hope* to *Gottenburgh*, with liberty to touch, ſtay, or trade, at all ports or places what and whereſoever on this and at the other ſide of the *Cape of Good Hope*, as intereſt ſhould appear. The cauſe was tried before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after Trinity Term 1802, when the jury found a verdict for the Plaintiffs, ſubject to the opinion of the Court upon a caſe, which ſtated (among other things not material to the point upon which the deciſion ultimately turned) that the Plaintiffs, merchants in *London*, were agents of a mercantile ſociety called the *Swediſh Aſiatic* Company, reſident at *Gottenburgh* in *Sweden*, and uſing the firm and ſtyle of *Anders Anderſon* and Co. That in 1794, this ſociety having engaged *Pendock Neale*, an *Engliſhman* by birth (but who had obtained letters of burgherſhip in *Sweden*) in the double capacity of captain and ſupercargo of their *Swediſh* ſhip the *Reſolution*, ſent him in *October* 1795 in this ſhip to *India* upon a general ſpeculation, for the purpoſe of traffic. That in the proſecution of this adventure, captain *Neale* having been at *Tranquebar* and *Manilla*, where he took in the greateſt part of his cargo, arrived at *Madras*, and there obtained of the two *Britiſh* houſes, *Kinderſley*, *Watts* and Co. and *Latour* and Co. part of the cargo upon which the policy was effected, and there loaded the ſame on board the *Reſolution*. That the goods ſhipped at *Madras* were entered and cleared at the cuſtom-houſe of that port, and that the ſaid ſhip was likewiſe entered inwards and cleared outwards at the ſame port. That on the firſt of *April* 1797, the *Reſolution* ſailed from *Madras* on her voyage to *Europe*, having on board, as part of her cargo, the goods which had been purchaſed at *Madras*, and alſo the goods taken on board at *Tranquebar* and *Manilla*; and that on her voyage home ſhe was captured by a *French* privateer and condemned.

The queſtion for the opinion of the Court was, Whether the Plaintiff was entitled to recover?

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Lens Serjt. for the Plaintiff. The only queſtion is, Whether, as part of the goods inſured were taken on board the *Reſolution*, a *Swediſh* veſſel, at *Madras*, the voyage is to be conſidered illegal, as being in contravention of the navigation laws 12 *Car.* 2. *c.* 18. *ſ.* 1, and 7 & 8. *Will.* & *Mar. c.* 22. *ſ.* 2. the former of which enacted, that "No goods ſhould be imported into or exported out of any lands, iſlands, plantations, or territories of his Majeſty in *Aſia*, *Africa*, or *America*, in any other ſhips but ſuch as belonged to the people of *England*, *Ireland*, *Wales*, or *Berwick upon Tweed*, or were of the built of and belonging to any of the ſaid lands, iſlands, plantations, or territories;" and the latter, that "No goods ſhould be imported into or exported out of any colony or plantation of his Majeſty in *Aſia*, *Africa*, or *America*, in any ſhip not of the built of *England* or *Ireland*, or the ſaid colonies and plantations, and wholly owned by the people thereof?" This queſtion is ſuppoſed to have been ſettled by the caſe of *Marck v. Abel*, *ante*, p. 35; but the point was there rather taken for granted than decided, the argument having turned upon the right to recover the premium, ſuppoſing the inſurance to have been illegal. It may be doubted, however, whether the above proviſions of the navigation laws, ſo far as they relate to the trade of foreigners, to and from the *Britiſh* poſſeſſions in *India*, were not repealed by the 53 *Geo.* 3. *c.* 52. The 138th ſection of that act having prohibited in general terms all his Majeſty's ſubjects from ſending the produce or manufactures of the *Eaſt Indies* or *China* to *Europe* in any other manner than that pointed out by the act, it is provided in *ſ.* 139, that the ſaid reſtriction ſhall not preclude the ſervants of the Company or free merchants from buying any goods in *India* and ſelling the ſame again in *India* to the ſubjects of foreign ſtates, or from acting as agents or factors in the importing or exporting, buying or ſelling goods in *India* for or on the account *bonâ fide* of any foreign company or any foreign merchant; and by *ſ.* 146, ſo much of the 21 *Geo.* 3. *c.* 65 as prohibits the ſervants of the Company, or other *Britiſh* ſubjects in *India*, from lending money to any foreign company, or foreign *European* merchants, or to purchaſe goods in *India* for and on account of any ſuch companies or merchants, or from being concerned in lending money or purchaſing goods to furniſh any ſuch companies or merchants with the credit of ſuch bills of exchange as are mentioned in that act, is thereby repealed.

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These provisions plainly recognize a right in foreign merchants to import and export to and from *India*, and though they do not in terms repeal the operation of the navigation laws with respect to foreigners trading to *India*, yet they must be considered as conferring on foreigners the right of that trade in which they authorize *British* subjects to assist them. It is true that the 37 *Geo.* 3. *c.* 117, which expressly authorizes this trade by foreigners, and which passed on the 19th of *July* 1797, subsequent to the sailing and capture of the *Resolution*, is not a declaratory but an enacting statute. Yet, if it should appear that, according to the true construction of the 33 *Geo.* 3. *c.* 52, the prohibitions of the navigation laws were already done away in respect of foreigners trading to the *East Indies*, they ought not to be prejudiced by a superabundant act of the Legislature in their favour.

Best Serjt. *contrà*. Though the provisions of a subsequent statute may operate as a repeal of a former one without express words for that purpose, yet a subsequent statute never can have that effect, unless it be so inconsistent with the former that they cannot stand together. But here no such inconsistency appears. Though the 33 *Geo.* 3. authorizes foreigners to buy and sell in *India*, it does not authorize them to export commodities in any manner different from that to which all exportation from that country was before confined by the navigation laws. In the case of *March v. Abel*, *ante*, 35, where an insurance was effected upon a *Danish* ship at and from *Bengal* to *Copenhagen*, and it appeared that the cargo was taken on board at *Calcutta*, the voyage was admitted to be illegal, and the Court held, that the insured could not recover.

Lord ALVANLEY Ch. J. Taking it for granted that the *East Indies* are to be considered as *British* colonies within the meaning of the navigation laws, it does not appear to me that the clauses which have been cited from the 33 *Geo.* 3. go the length of repealing the restriction of those laws with respect to the *East Indies*. It is true that the rigour of those laws had been considerably relaxed in practice with respect to the *East Indies* previous to the 37 *Geo.* 3., but the laws still remained in force. The doctrine of desitution has no existence in the law of *England*, though it has in that of *Scotland*. It is urged that the clauses of the 33 *Geo.* 3. are inconsistent with the provisions of the navigation acts; for it is said that the Legislature, by empowering foreigners to trade to and

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from *India*, have authorized them to carry on their trade in their own ships. But the Legislature, by empowering foreigners to buy and sell within the limits of the *East India Company*'s charter, without being subject to penalties, are not to be considered as having repealed any part of those laws which were made for the encouragement of *British* navigation. The right to buy and sell may be given to foreigners, and yet the obligation to export in *British* ships may remain. We will look into the clauses, but unless we should have occasion to alter our opinion, we think that a nonsuit must be entered.

On this day Lord *Alvanley* said, that *the Court* had looked into the acts of parliament, and were of opinion, that the navigation laws were not repealed with respect to the *East Indies* by the clauses in the 33 *Geo.* 3.

Per Curiam. Nonsuit to be entered.

(IN THE EXCHEQUER CHAMBER.)

HANKIN *v.* BROOMHEAD, One, &c. in Error. *Feb.* 4th.

DECLARATION in the *King's Bench* in debt on bond for 2000*l.* concluding to the Plaintiff's damage of 100*l.* Judgment having been suffered by default in *Easter* Term 1799, the following judgment was entered: "Therefore it is considered that the said *Esther Hankin* recover against the said *John Broomhead* the said debt, and also 9*l.* 10*s.* for her damages which she hath sustained, as well by reason of the detaining the said debt, as for her costs and charges about her suit in this behalf expended, by the Court of our Lord the King, now here adjudged to the said *Esther* by her assent; and the said *John* in mercy," &c. In *Easter* Term 1800, the Plaintiff below proceeded to assign breaches under the 8 & 9 *Will.* 3. alleging, that the bond declared on was in the penal sum of 2000*l.* conditioned for the performance of certain covenants, which had been broken by the Defendant below. Upon this assignment of breaches a writ of inquiry was awarded and executed before the Chief Justice, and damages were assessed at the sum of 1115*l.* 13*s.* 4*d.* over and above the costs of suit, together with 31*l.* 6*s.* 8*d.* for costs; but afterwards entered a *remittitur* on the roll for the costs.

Judgment by default having been suffered in an action on a bond, the Plaintiff entered up judgment for the penalty, together with 9*l.* 10*s.* for damages and costs. A writ of inquiry having been executed, damages were assessed at 1115*l.* 13*s.* 4*d.* and costs 40*s.* And the Plaintiff entered up another judgment for those damages. Held that the second judgment was erroneous.

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and for thoſe coſts 40*s*. The record, after ſtating the return of the writ of inquiry, and continuances to a particular day, proceeded thus: "At which day, before our ſaid Lord the King at *Weſtminſter*, comes the ſaid *Eſther* by *T. P.* her attorney, and thereupon all and ſingular the premiſes being ſeen, and by the Court of our ſaid Lord the King before the King himſelf, now here fully underſtood, and mature deliberation being thereupon had, it is conſidered by the ſame Court here, according to the ſtatute in ſuch caſe made and provided, that the ſaid *Eſther* do recover againſt the ſaid *John* her damages aforeſaid, in form aforeſaid found, and alſo 31*l*. 6*s*. 8*d*. for her further coſts and charges by her about her ſuit in this behalf expended, by the Court of our ſaid Lord the King now here adjudged to the ſaid *Eſther*, and with her aſſent, which ſaid coſts, charges, and damages, and further coſts and charges in the whole amount to 1158*l*. 10*s*.; and the ſaid *John* in mercy, &c. And hereupon the ſaid *Eſther* freely here in court remits to the ſaid *John* the ſaid ſeveral ſums of 40*s*. and 31*l*. 6. 8*d*. in form aforeſaid found and awarded to the ſaid *Eſther* for her coſts and charges aforeſaid; therefore as to thoſe coſts and charges let the ſaid *John* be acquitted and go thereof without a day," &c.

The Defendant below having brought a writ of error, aſſigned for error, "That the declaration aforeſaid, and the matters therein contained, are not ſufficient in law for the ſaid *Eſther* to have or maintain her aforeſaid action thereof againſt him to the extent for which the judgment aforeſaid is given, nor ſupport or warrant the judgment ſo as aforeſaid given in form aforeſaid; there is alſo error in this, to wit, that by the declaration aforeſaid, on which the ſaid judgment is given, no more than a debt of 2000*l*. and 100*l*. damages for the action thereof are claimed, and yet, by the record aforeſaid, it appears that by the judgment aforeſaid, in form aforeſaid given, it is adjudged that the ſaid *Eſther* recover againſt the ſaid *John*, not only her ſaid debt of 2000*l*. and alſo 9*l*. 10*s*. for her damages which ſhe had ſuſtained as well on occaſion of the detaining the ſaid debt as for her coſts and charges by her about her ſuit in that behalf expended, but alſo that the ſaid *Eſther* recover againſt the ſaid *John* her damages to the amount of 1115*l*. 13*s*. 4*d*. aſſeſſed by the jury aforeſaid on the within mentioned inquiſition, as the damages ſuſtained by the ſaid *Eſther* on occaſions of the breach of the condition of the ſaid writing obligatory in the ſaid declaration mentioned, which ſaid debt and damages ſo

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by the ſaid judgment awarded and adjudged to be recovered by the ſaid *Eſther* againſt the ſaid *John*, amount in the whole to the ſum of 3,125*l.* 3*s.* 4*d.*, being a much greater ſum than the full amount of the debt demanded and the damages laid in the ſaid declaration and thereby ſought to be recovered, therefore in that there is manifeſt error; there is alſo error in this, to wit, that by the record aforeſaid, it appears that the judgment aforeſaid, in form aforeſaid is given for the ſaid *Eſther* againſt the ſaid *John* for greater and other ſums and to a larger amount than the full amount of the debt demanded, and all the damages laid in and by the declaration aforeſaid, therefore in that there is manifeſt error; there is alſo error in this, to wit, that there are two diſtinct judgments given by the Court on the premiſes, notwithſtanding the firſt of ſuch judgments purports to be final; and there is alſo error in this, that it does not appear in and by the ſuggeſtion made by the ſaid *Eſther*, but that the ſaid *John Wilkinſon* and *Robert Woodgate*, or one of them, did transfer and pay to the ſaid *Eſther* the ſaid ſtock in the ſaid indenture mentioned, at the time therein mentioned, according to the form and effect of the ſaid condition."

Raithby for the Plaintiff in error. If in the preſent caſe the Defendant in error in entering up judgment has deviated from the courſe pointed out by the 8 & 9 *Will.* 3. *c.* 11. he will be unable to maintain his judgment, notwithſtanding he may be able to ſhew that in this particular inſtance no injuſtice will be done; for ſince the caſes of *Roles* v. *Roſewell*, 5 *T. R.* 538. and *Hardy* v. *Bern*, 5 *T. R.* 636. the proviſions of the ſtatute of *Will.* 3. have been held to be compulſory upon the parties. The 8th ſection of that ſtatute conſiſts of two parts applicable to this ſubject. It firſt enacts, that if judgment ſhall be given for the Plaintiff on demurrer, or by confeſſion on *nil dicit*, the Plaintiff may ſuggeſt breaches, and a writ ſhall iſſue to the Sheriff, and the Judges of aſſize ſhall make return thereof to the court from whence the ſame iſſued. It then proceeds to ſay, that in caſe the Defendant, *after ſuch judgment*, and before execution, ſhall pay into court the damages and coſts, execution ſhall be ſtayed. The word "judgment" here, muſt be taken to mean the judgment before named, *viz.* the common law judgment. The ſtatute therefore does not enable the party, after having firſt obtained his common law judgment, to enter a ſecond equitable judgment, according to the cir-

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cumſtances of the caſe, but only to obtain an equitable execution upon the firſt judgment, ſuch judgment being reſtrained in its effect againſt the Defendant, by the finding of the jury upon the breaches ſuggeſted. It is incumbent on the party therefore, as often as he is aggrieved to aſſign breaches, but not as often as he is aggrieved to enter up judgments; and if the mode adopted by the Defendant in error ſhould prevail, the ſubſequent judgments, inſtead of reſtraining the firſt judgment, will only be cumulative, and give the party a right to ſo many executions in addition to that upon the firſt judgment.

Lawes contrà. The argument for the Plaintiff in error rather tends to ſhew that the ſecond judgment is unneceſſary than that it is unjuſt: and indeed, as the Plaintiff in error only prays that the judgment may be reverſed, when in fact there are two judgments upon record, it may be objected that he is not very regular in the manner of appearing before the Court; for if it be uncertain to which of the two judgments the writ of error applies, it is bad. The Plaintiff below was entitled to take his common law judgment notwithſtanding the 8 & 9 *Will.* 3. *Goodwin* v. *Crowle*, *Cowp.* 357. in which caſe Lord *Mansfield* ſays: "The true conſtruction and ſubſtantial juſtice of the act is, that the penalty ſhall not be levied in any caſe whatever; but the judgment in this caſe being upon demurrer, it muſt be as uſual to recover the debt;" and he then proceeds to ſtate, that the time to make an application is when the party takes out execution for the whole penalty. Accordingly, in that caſe, the common law judgment which had been entered for the Plaintiff below was affirmed in error. This ſhews therefore, that the firſt judgment on this record is good; and ſhould the Court hold the ſecond judgment to be erroneous, their deciſion will not affect the validity of the firſt. The ſtatute of *Will.* 3. was paſſed to mitigate the rigour of the common law judgment. But it expreſsly ſays, that ſuch judgment ſhall ſtand as a ſecurity for future breaches. The Courts therefore are not precluded from giving a ſecond judgment, but may follow what mode they pleaſe, provided they do that which is conſiſtent with the object that the legiſlature had in view. The fair implication therefore is, that the Court may regulate the common law judgment by giving to the party a ſecond judgment which may ſecure to him thoſe damages that have been aſſeſſed. The writ of in-

quiry is to be executed before the Chief Juſtice, and is to be returned to the court. Now for what purpoſe is this, unleſs it be for the ſame purpoſe for which all writs of inquiry are executed and returned, namely, that the Court may give judgment upon it? Beſides, there is a *dies datus* to the party, that he may come to the court and receive judgment. The Defendant below has no reaſon to complain of this kind of proceeding, for it enables him to come to the court and move in arreſt of judgment before execution can be taken out, of which benefit he would be deprived if execution were iſſued immediately after the aſſeſſment of damages. It is true that Mr. Serjt. *Williams* in a note to the caſe of *Gainsford* v. *Griffith*, 1 *Saund. p.* 58. *note* 1. has given a precedent in a different form from that adopted in this caſe; but the practice has been to enter up the proceedings in caſes under the ſtatute of *Will.* 3. according to the form purſued in this record; and in *Trin.* 40 *Geo.* 3. in a caſe of *Ilderwood* v. *Seddon*, error was aſſigned upon a record ſimilar to the preſent, and the judgment was affirmed though without argument.

Cur. adv. vult.

On this day the opinion of the Court was delivered by,

Lord ALVANLEY Ch. J. In this caſe judgment having gone by default, and having been entered up for the debt and damages, together with the coſts, the Plaintiff below proceeded under the ſtatute of *W.* 3. to ſuggeſt that the bond declared upon was a bond with a penalty conditioned for the performance of certain covenants, and that he had ſuſtained damage by the breach of thoſe covenants to the amount of 1115*l.* 13*s.* 4*d.* The jury having found that he was ſo damnified, upon the return of the inquiſition to the Court, the Plaintiff below inſtead of ſuing out execution for the ſum to which he was entitled, aſks the Court for a ſecond judgment, not ſtating it to be in lieu of the firſt judgment, but only entering a *remittitur* as to the coſts. The firſt judgment therefore remains upon the record in full force. Upon this record errors have been aſſigned. I am ſorry to find that none of the courts have ever been moved as to the proper mode of entering up judgments under the ſtatute of *William* in caſes of this kind. At common law no doubt the party was entitled to take his judgment for the penalty in the bond, and the Defendant could only obtain relief through the interpoſition of a court of equity, which would direct

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direct an iſſue of *quantum damnificatus*, and prevent any execution being enforced for more than the damage actually ſuſtained. To avoid ſo circuitous a mode of relief, and to afford to parties the benefit of the above equitable execution, the ſtatute of *William* was paſſed. Mr. Serjt. *Williams*, in his note to *Gainsford* v. *Griffith*, 1 *Saund.* 58. has ſuggeſted a mode of entering up the proceedings upon record in caſes where a party obtains judgment by default, or upon demurrer, and is obliged to proceed under the ſtat. of *William* 3; to which I ſee no objection. The only difficulty in thoſe caſes reſpects the coſts of the inquiſition, which if he does not obtain he is in a worſe condition than he would have been before the ſtatute. Where the Defendant proceeds to iſſue in the firſt inſtance upon the breaches, this difficulty does not occur, for there the *poſtea* returned is indorſed for the Plaintiff's full damages and coſts. Mr. Serjt. *Williams* recommends that in order to obviate that difficulty, the judgment ſhould be ſuſpended till after the return of the inquiſition. That however has not been done here, and whatever inconvenience the Plaintiff below may ſuſtain, we cannot aſſiſt him. We are of opinion that the ſecond judgment cannot ſtand; but we rather incline to think that if the coſts had not been remitted, the Court of *King's Bench* upon motion might have ordered the maſter to tax thoſe coſts, and then added them to the ſum to be levied under the execution. The judgment of this Court therefore is, that the ſecond judgment, with the amercement be reverſed, and that the former judgment remain unimpeached.

Judgment accordingly.

Feb. 9. h.

NEWMAN *v.* WALTERS.

A ſhip being in danger, and the captain and part of the crew having made their eſcape, a paſſenger at the requeſt of the reſt of the crew, took the command and brought the ſhip ſafe to port. The merits of the paſſenger in ſaving the ſhip were acknowledged by the owner in a letter to one of the underwriters, wherein he expreſſed his deſire to make him a compenſation. Held that the paſſenger was entitled to ſue the owner for ſalvage.

INDEBITATUS ASSUMPSIT. The firſt count of the declaration was for "the ſalvage of a certain ſhip called the *Betſy*, and cargo of goods, wares, and merchandizes of the Defendant, wherewith the ſaid ſhip was then laden, which ſaid ſhip and cargo had before that time ſtruck and ſtranded in a certain place called *Chicheſter*

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Shoals, and was then and there ſaved and ſafely delivered to the Defendant by the Plaintiff, to wit, at," &c. The ſecond count was for work and labour in and about the ſaving and preſerving, and ſafely delivering to the Defendant the ſaid ſhip and cargo ſo ſtruck and ſtranded as aforeſaid. There was a third count for work and labour generally; and a fourth upon a *quantum meruit* for the ſame.

The caſe was tried before Lord *Alvanley* Ch. J. and a ſpecial jury at the *Guildhall* Sittings after laſt *Michaelmas* Term, when it appeared that the Plaintiff, who had been a captain in the merchants' ſervice, went out as a free paſſenger on board the *Betſey*, of which the Defendant was owner, on a voyage from *Graveſend* to *Saint Kitts*; that ſhe left the *Downs* on the 15th of *April*, and ſoon after ſtruck on the rocks off *Chicheſter*; that the ſhip being in apparent danger, the captain of the ſhip got into the pinnace, and with three of the crew made his eſcape; that at this time the pilot was drunk, and the mate, together with the reſt of the crew, requeſting the Plaintiff to take charge of the ſhip, he did ſo, and immediately gave the neceſſary orders, and was obeyed by all perſons on board as captain; that when he firſt took the command the pilot was about to let go the anchor, by which the ſhip would probably have been loſt, but was prevented by the interference of the Plaintiff; and that the Plaintiff brought the ſhip ſafe into *Ramſgate* harbour. Two letters from the Defendant to one of the underwriters were read in evidence, in both of which he expreſſed his belief that the Plaintiff had been the means of ſaving the ſhip, and that in the account of the general average given in by his broker he had put down 200*l.* as the leaſt poſſible ſum which could be given to the Plaintiff by way of compenſation, but that whatever more might be allowed to him would afford him ſatisfaction. It was objected, that under the above circumſtances the Plaintiff was not entitled to claim for ſalvage, and his Lordſhip rather inclined to that opinion, but directed the jury to conſider what compenſation the Plaintiff was entitled to. The jury found that the Plaintiff, after the deſertion of the ſhip by the captain, took upon himſelf the care and management of the ſhip, which would have been loſt but for his exertions, and gave a verdict for 400*l.*

Early in the term a rule *niſi* for a new trial was moved for, firſt, on the ground that the Plaintiff, under the circumſtances of

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this case, was not entitled to recover any thing; and secondly, on the ground of the jury having given too large a compensation to the Plaintiff, supposing him entitled to recover any thing: and the rule having been granted on the first ground only,

Shepherd and *Heywood* Serjts. now shewed cause. To the exertions of the Plaintiff must be altogether ascribed the preservation of the ship; the only question therefore will be, Whether he did more than as a passenger he was bound to do, and if he did, whether such services entitle him at law to any compensation? If it be contended, that because the Plaintiff was a passenger he is not entitled to salvage, the opinion of Sir *W. Scott* may be referred to, who, in *The Two Friends*, 1 *Rob. Adm. Rep.* p. 285., expressly awarded an higher rate of salvage to a person because he was merely a passenger and not an ordinary seaman. In *The Beaver*, 3 *Rob. Adm. Rep.* 292., Sir *W. Scott*, in apportioning the salvage, considers how far the person there claiming had embarked his services beyond what his duty called upon him to do, and rewards him accordingly. The principle of that decision applies to the present case; for it cannot be denied that the Plaintiff, in his endeavours to save the ship, went beyond what his duty called upon him to perform. And in *The Joseph Harvey*, 1 *Rob. Adm. Rep.* 306. Sir *W. Scott* says, "It may be in an extraordinary case difficult to distinguish a case of pilotage from a case of salvage properly so called; for it is possible that the safe conduct of a ship into port under circumstances of extreme danger and personal exertion may exalt a pilotage service into something of a salvage service." Here the Plaintiff conducted the ship into port under circumstances of extreme danger and personal exertion, his situation on board the ship not calling upon him to risk either. If it be said that salvage only extends to those who come from the shore, or at least from a situation of safety, and not to those who being on board the ship exert themselves to save both themselves and the ship, no such distinction is to be found either in the laws of *Rhodes* or *Oleron*, nor does the language of the old statutes point at it. In *Beawes Lex Merc.* p. 131. salvage is called an allowance for saving the ship or cargo from the dangers of thieves, pirates, or other perils. And in *Vin. Ab.* tit. *Salvage*, the laws of *Oleron* and the laws of *Rhodes* are referred to, from which it appears, that in case of disability of the ship to proceed, those who save part of the cargo

cargo with themſelves are entitled to ſalvage. From whence it may be collected that thoſe on board the ſhip, as well as thoſe who come to the ſhip, may claim ſalvage.

Cockell, *Bayley*, and *Beſt*, Serjts. *contrà*. If the Plaintiff be entitled to recover, every other perſon on board who aſſiſted him in conducting the ſhip into port is equally entitled. By his exertions the Plaintiff has undoubtedly rendered the Defendant a conſiderable ſervice, but the queſtion is, Whether it be a ſervice for which he is entitled to a pecuniary compenſation? A man who drains his own lands, and thereby benefits the lands of his neighbour, can demand no compenſation for ſuch a benefit. The caſe of the paſſenger in *The Two Friends* differs from this, becauſe there was a recapture; now with capture the duty of every perſon on board ends; recapture therefore is always ſomething *ultrà* the duty of thoſe who are engaged in it. But in caſes of extreme peril it is the duty of every perſon on board to aſſiſt in ſaving the ſhip. If the plaintiff be not entitled to recover as for ſalvage, he cannot recover as for work and labour done; for though the law implies a promiſe to pay where a benefit has been conferred at the loſs or riſk of a third perſon, yet that is only where the benefit reſults ſolely to the perſon charged, without any participation of the party charging. Here the Plaintiff was benefited by the ſhip being ſaved as well as the Defendant.

After argument the caſe ſtood over till the next day, when the learned judges delivered their opinions.

Lord ALVANLEY Ch. J. (after ſtating the caſe). The queſtion is, Whether the Plaintiff in this action be entitled to recover any thing? I was rather ſurpriſed to hear it contended, that when the perſon who had the command of the ſhip had deſerted her, the Plaintiff, who was a mere paſſenger, was bound to interfere for her ſafety. The crew indeed ought not to deſert the ſhip ſo long as they can poſſibly remain on board, and if the mate in this caſe had ſaved the ſhip by doing what the Plaintiff did, he would not have been entitled to claim a compenſation in the nature of ſalvage. I do not go the length of ſaying, that a paſſenger who is found on board in time of danger is to do nothing; he muſt do works of neceſſity for the preſervation of the lives of all on board. But here the Plaintiff did more than he was called upon by his duty to perform; for when he took upon himſelf the direction of the ſhip he made himſelf reſponſible in the ſame manner as if he had

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been maſter. This he was under no obligation to do. In ſumming up this caſe to the jury I ſtated to them, that this was not literally a caſe of ſalvage, but I have ſince been induced to alter that opinion, particularly by what is reported to have fallen from Sir *W. Scott*, 1 *Robinſon's Admiralty Rep.* p. 306. reſpecting the claim of a pilot praying ſalvage; for he there ſays, "it may be in an extraordinary caſe difficult to diſtinguiſh a caſe of pilotage from a caſe of ſalvage properly ſo called; for it is poſſible that the ſafe conduct of a ſhip into a port under circumſtances of extreme danger and perſonal exertion may exalt a pilotage ſervice into ſomething of a ſalvage ſervice." Suppoſe a tempeſt ſhould ariſe while the pilot is on board, and he ſhould go off in a boat to the ſhore to fetch hands, and ſhould riſk his life for the ſafety of the ſhip in a manner different from that which his duty as a pilot required: in ſuch caſe it ſeems to me that he would be entitled to a compenſation in the nature of ſalvage, and I am glad that Sir *W. Scott* appears to entertain the ſame opinion. Without entering into the diſtinctions reſpecting the duties incumbent on a paſſenger in particular caſes, I think, that if he goes beyond thoſe duties he is entitled to a reward in the ſame manner as any other perſon. In this caſe the plaintiff did not act as a paſſenger when he took upon himſelf the direction of the ſhip; he did more than was required of him in that ſituation, and having ſaved the ſhip by his exertions is entitled to retain his verdict in this action.

HEATH J. My Lord has entered ſo fully into this caſe that it will not be neceſſary for me to make many obſervations. The character of a paſſenger differs materially from that of a ſeaman or one of the crew. The paſſenger, in conſideration of an undertaking from the maſter to give him a paſſage, contracts to pay a ſum of money; all the reſidue of the contract is in his favour; the maſter is bound to carry him to his place of deſtination, but the paſſenger may give up his paſſage if he pleaſes, and quit the ſhip, unleſs under very particular circumſtances. If indeed the ſhip be attacked he muſt defend it, and he will be entitled to prize-money. But if the ſhip be in ſuch diſtreſs that ſhe can only make her way by pumping, it is the duty of the crew to keep her alive until ſhe arrive at a place of ſafety; yet if the paſſenger meet with another ſhip at ſea he is at liberty to abandon that on board of which he has taken his paſſage. So here the

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Plaintiff, if he had pleaſed, might have gone aſhore. It does not appear that the weather was ſtormy, or that there was any other circumſtance to prevent him. The merits of the Plaintiff were expreſsly recognized in a letter from the Defendant, who acknowledged that the ſhip was ſaved by his ſkill. It ſeems to me therefore, to be the ſame as if he had given expreſs orders to the Plaintiff for his conduct. *Omnis ratihabitio retro—trahitur et mandato priori æquiparatur.* I am therefore clearly of opinion the Plaintiff is entitled to his verdict.

ROOKE J. Under the ſpecial circumſtances of this caſe, I think the Plaintiff is entitled to recover. The Plaintiff, who was a mere paſſenger, might have gone on ſhore in the boat without danger, but being deſired by the mate and all the crew to ſtay and take the command of the ſhip, he did ſo. This may be conſidered as a retainer by the only perſons who were the agents of the owners at the time. When he comes on ſhore, one of the owners recognizes his conduct and approves of all that he has done. On this ſpecial ground I am clearly of opinion that this action may be ſupported.

Rule diſcharged.

HARWOOD and Another, Executors, &c. *v.* LESTER.

Feb. 9th.

A. delivered goods under the value of 40*s.* to a carrier in *London* purſuant to an order from *B.* reſident in *Leiceſterſhire*, and *B.* received the goods in the latter county. Held that no action for the goods could be maintained in the county court of *Leiceſterſhire*, and that the court of *Common Pleas* therefore could not ſtay proceedings in an action commenced in that Court.

ON the laſt day of laſt Term a rule was made abſolute on the motion of *Williams* Serjt. for ſtaying all proceedings in this action, on the ground of the cauſe of action being only 1*l.* 1*s.* 6*d.* and therefore not fit to be entertained in this Court, the Plaintiffs having their remedy in the county court. Early in this Term a rule *niſi* was obtained for diſcharging the above rule, and affidavits were filed to ſhew that the action was commenced againſt the Defendant who reſided at *Lutterſhall* in *Leiceſterſhire*, for the value of ſome caſks, in which the Plaintiffs' teſtator had, according to the Defendant's order, ſent down ſome liquor by a carrier named by the Defendant, and for which caſks he refuſed to pay, though the account for the liquor had been ſettled by him; and it was thereupon inſiſted that the cauſe of action being complete by the delivery to the carrier in *London*, no action could be maintained in

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the county court of *Leiceſterſhire*, the only county court to which the Defendant, from his reſidence, was liable to be ſummoned.

Againſt that rule *Williams* Serjt. now ſhewed cauſe. The ſeveral caſes of *Stean* v. *Holmes*, 2 *Bl.* 754., *Kennard* v. *Jones*, 4 *T. R.* 495, and *Wellington* v. *Arters*, 5 *T. R.* 64., are deciſive authorities to ſhew that the ſuperior courts will not entertain actions for ſuch trifling ſums as that ſued for in this caſe. Admitting the principle laid down in the ſeveral caſes of *Welſh* v. *Troyte*, 2 *H. Bl.* 29., *Tubb* v. *Woodward*, 6 *T. R.* 175., *Buſby* v. *Fearon*, 8 *T. R.* 235., and *Smith* v. *O'Kelly* (*a*), that where the Plaintiff cannot ſue in the county court, he may bring his action in the ſuperior courts, however ſmall the debt may be, ſtill they do not apply to this caſe; for here, though the legal delivery of the caſks in queſtion (at leaſt as to many purpoſes) took place in *London*, yet the actual delivery to the Defendant at *Lutterſhall* having completed the Plaintiff's right of action in *Leiceſterſhire*, he might have ſummoned the Defendant to the county court there. If ſo the application to this Court to ſtay proceedings was well founded, and this rule muſt be diſcharged.

Shepherd Serjt. in ſupport of the rule. The goods which are the ſubject of the preſent action being delivered to the carrier in *London*, the cauſe of action was complete there; indeed ſo much ſo, that if they had been embezzled by the carrier before he quitted *London*, or had been loſt by him there, he would have been liable to the Defendant. If then the right of action were complete by delivery to the carrier in *London*, the ſubſequent arrival of the goods in *Leiceſterſhire* to the Defendant could not alter the caſe, for it did not give him a new right of action. In *Smith* v. *O'Kelly*, this Court refuſed to interfere, on the ground that the cauſe of action having ariſen at *Newmarket*, the Defendant could not be ſummoned to the county court in *Middleſex*. Now in this caſe the ſale and delivery in *London* to the carrier who was the agent of the Defendant, completed the Plaintiff's cauſe of action in *London*, and no ſubſequent actual delivery to the Defendant himſelf in *Leiceſterſhire* could take the cauſe of action out of that county where it was once complete.

HEATH J. intimated that authorities were to be found in the books, to ſhew that where goods are ſent from one county into

(*a*) *Ante*, vol. i. p. 75.

 another,

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another, the cauſe of action is conſidered as ariſing in the county from whence they are ſent, and not in that where they are delivered; and he obſerved, that the right to ſtop *in tranſitu*, which was an anomalous right introduced from courts of equity, could make no difference in the principle of law. *The Court* wiſhing to examine thoſe authorities, deſired that the matter might ſtand over.

And now Lord ALVANLEY Ch. J. ſaid, We have looked into the caſes relating to inferior juriſdictions, and are convinced, though not without regret, that we cannot put a ſtop to the Plaintiff's proceeding in this action, becauſe the Plaintiff's cauſe of action did not ſo originate as to give the county court of *Leiceſterſhire* juriſdiction. I rather think the whole cauſe of action muſt ariſe within the juriſdiction of the inferior court, to enable a party to proceed in that court. Now that cannot be contended in this caſe. Indeed my brothers are of opinion that the goods which are the ſubject of this action were both ſold and delivered in *London*. Unqueſtionably they were bargained for and ſold in a ſhop in *London*; part therefore if not the whole of the contract aroſe there. There can be no doubt that the moment the goods were delivered to the carrier in *London*, the Plaintiff's teſtator might have commenced his action. Can we decide then that there was a period at which the ſuit might have been well commenced in *London*, and not have been liable to be ſtopped by the interference of the Court; and yet that by the ſubſequent event of the actual delivery to the Defendant in *Leiceſterſhire*, we are authorized to ſtay the proceedings?

Rule abſolute for diſcharging the former rule.

Feb. 10th.

JOHN POOLE *v.* LUCY POOLE and Others.

Deviſe to teſtator's firſt ſon by his wife begotten or to be begotten for life, remainder to truſtees to preſerve contingent remainders; remainder to the ſeveral heirs male of ſuch firſt ſon lawfully iſſuing, ſo as the elder of ſuch *ſons* and the heirs male of his body ſhall always be preferred and take before the younger and the heirs male of his body; remainder to the teſtator's 2d, 3d, 4th, and all and every other ſon and ſons for their ſeveral and reſpective lives; remainder to truſtees, and to preſerve, &c.; remainder to the ſeveral heirs male of their ſeveral and reſpective bodies lawfully iſſuing, ſo as the elder of ſuch *ſons*, and the heirs male of his body, ſhall be always preferred and take before the younger of the ſame ſons, and the heirs male of his and their body and bodies; remainder to the teſtator's firſt and other daughters for their lives; remainder to truſtees, &c. remainder to the ſeveral heirs of their ſeveral and reſpective bodies lawfully iſſuing, ſo as the elder of ſuch *daughters*, and the heirs male of her body, ſhall always be preferred and take before the younger of the ſame daughters, and the heirs male of her and their body and bodies. There were other clauſes in the will, by which after giving an eſtate for life to the firſt taker, the teſtator limited to truſtees, &c; remainder to the firſt and other *ſons* of ſuch firſt taker, and the heirs of their bodies, ſo as the elder of ſuch ſons, and the heirs of their bodies, ſhould always be preferred before the younger of the ſame *ſons* and the heirs male of their bodies. Held that the firſt ſon of the teſtator took an eſtate tail.

THIS was a caſe from the Court of Chancery.

James Poole, by his will bearing date the 6th *February* 1784, gave and deviſed his freehold and copyhold eſtates in the words following: "*Item*, All my freehold and copyhold eſtates called *Blakelow*, within the manor and foreſt of *Macclesfield* in the county of *Cheſter*, and all other my real eſtate whatſoever and whereſoever, and of what nature or kind ſoever that I ſhall die poſſeſſed of, or entitled unto at the time of my deceaſe, in poſſeſſion, reverſion, remainder, or expectancy, I give, deviſe and bequeath unto *John Davenport* and *John Ediſon*, and their heirs; to the uſe of them and their heirs upon truſt, for the ſeveral uſes, intents and purpoſes hereinafter mentioned and declared of and concerning the ſame (that is to ſay), in truſt, that they receive and take the rents and profits of my ſaid eſtate, for the uſe and benefit of my firſt ſon by *Lucy* my wife, begotten or to be begotten, during his life; and alſo upon truſt to preſerve the contingent remainders from being defeated or deſtroyed, and after his deceaſe in truſt for the ſeveral heirs male of ſuch firſt ſon lawfully iſſuing, ſo as the elder of ſuch ſons, and the heirs male of his body, ſhall always be preferred and take before the younger and the heirs male of his body, and for want of ſuch iſſue, in truſt for my ſecond, third and fourth, and all and every other ſon and ſons for their ſeveral reſpective lives; and alſo upon truſt to preſerve the contingent remainders from being defeated or deſtroyed; and after their ſeveral deceaſes in truſt for the ſeveral heirs male of their ſeveral and reſpective bodies lawfully iſſuing, ſo as the elder of ſuch ſons, and the heirs male of his body, ſhall be always preferred and take before the younger of the ſame ſons, and the heirs male of his or their body and bodies, and

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for want of such issue in trust for my first daughter, and every other my daughter and daughters for their several and respective lives, for their several sole and separate use, free from the power or debts of any husband they may any of them marry; and also upon trust to preserve the contingent remainders from being defeated and destroyed; and from and after their several deceases, in trust for the several heirs male of their several and respective bodies lawfully issuing, so as the elder of such daughters and the heirs male of her body, shall always be preferred and take before the younger of the same daughters, and the heirs male of her and their body and bodies. And I do hereby empower such persons as shall be entitled to the possession of my said estates, to settle by way of jointure upon any woman with whom they may marry, any part of such estates not exceeding the value of 500*l. per annum*. And I do hereby direct that my eldest son shall not be entitled to the possession of my real or personal estate till he attain the age of 27 years; but I hereby empower my executors, at their discretion, to allow any sum for his maintenance and education not to exceed 300*l. per annum*, till he attain the age of 21 years, and from that time to pay to my said son the sum of 500*l. per annum* till he attain the age of 25 years, and from that time the sum of 1000*l. per annum* till he attain the said age of 27 years. *Item*, all my freehold and copyhold estate, and all other my real estate whatsoever and wheresoever, and of what nature or kind soever, that I shall die possessed of or entitled unto at the time of my decease, in possession, reversion, remainder or expectancy, and all the rest, residue and remainder of my personal estate, and every part and parcel thereof, after payment of my debts and legacies last mentioned, in failure of such issue by me as aforesaid, and not otherwise, I do hereby give, devise, and bequeath the interest, rents, and profits of the same, and every part and parcel thereof, unto the said *John Davenport* and *John Edison* and their heirs, to the use of them and their heirs, subject to the annuities by me hereby given, in trust that they lay out and invest my said personal estate in the purchase of freehold or copyhold lands, tenements and hereditaments in *England* or *Wales* in their names as aforesaid, to the use of them and their heirs, in trust to and for the several uses, interests, and purposes hereinafter-mentioned of and concerning the same, (that is to say,) upon trust that they permit and suffer my nephew *Thomas Poole*, now residing in the *East Indies*, son of my

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my nephew *John Poole*, to receive and take the rents and profits of all and every my ſaid eſtates, for and during his life, ſubject to and chargeable with the payment of an annuity of 200*l. per annum* to his father the ſaid *John Poole* during his natural life, payable quarterly; and alſo upon truſt to preſerve the contingent remainders hereinafter limited, and after his deceaſe, in truſt to permit my nephew *Anderton Poole*, ſon of my late brother *Joſeph Poole*, to receive and take the rents and profits of my ſaid eſtate for his life, ſubject to the ſaid annuities; and alſo upon truſt to preſerve the contingent remainders hereinafter limited; and after his deceaſe in truſt for the firſt and every other ſon and ſons of the body of the ſaid *Anderton Poole*, lawfully to be begotten, ſucceſſively as they ſhall be in priority of birth and ſeniority of age, and the ſeveral heirs of their reſpective bodies lawfully iſſuing, ſo as the elder of ſuch ſons, and the heirs of his body, ſhall always be preferred and take before the younger of the ſaid ſons, and the heirs of his and their bodies; and for want of ſuch iſſue, in truſt to permit and ſuffer the ſaid *James Poole*, ſon of my late brother *Joſeph Poole*, to receive and take the rents and profits of my ſaid eſtates for his life, ſubject to the ſaid annuities; and alſo to preſerve the contingent remainders hereinafter limited; and after his deceaſe, in truſt for the firſt and every other ſon and ſons of the body of the ſaid *James Poole*, lawfully to be begotten, ſucceſſively as they ſhall be in priority of birth, and ſeniority of age, and the ſeveral heirs of their reſpective bodies lawfully iſſuing, ſo as the elder of ſuch ſons, and the heirs of his body, ſhall always be preferred and take before the younger of the ſame ſons, and the heirs of his and their bodies; and for want of ſuch iſſue, to *John Poole Mair*, ſon of my neice *Elizabeth Mair*, and his heirs for ever." The teſtator afterwards died without having revoked or altered his will. He left *John Poole* his only ſon and heir at law, then an infant under the age of 21 years, and one daughter. The ſaid *John Poole*, the teſtator's ſon, has attained the age of 27 years. The teſtator's copyhold eſtates were duly ſurrendered by him to the uſe of his will.

The queſtion was, What eſtate *John Poole*, the ſon of the teſtator, took under the will of the teſtator?

Williams Serjt. for the plaintiff, was deſired by the Court to argue this caſe as if the limitations in diſpute had created legal eſtates.

eſtates.—*John Poole* the Plaintiff took an eſtate tail. The limitation to *John Poole* in this caſe amounts to nothing more than a deviſe to him for life, remainder to truſtees to preſerve contingent remainders, remainder to the heirs male of his body, and for want of ſuch iſſue then over. For the words "ſo as the elder of ſuch ſons and the heirs male of his body ſhall always be preferred and take before the younger and the heirs male of his body," are nothing more than the law would have implied; for the ſons of every tenant in tail take by priority of birth and ſeniority of age. *Expreſſio eorum quæ tacite inſunt nihil operatur.* Had theſe unneceſſary words been omitted *John Poole* would clearly have taken an eſtate tail, notwithſtanding the expreſs limitation to him for life, with remainder to truſtees. *Sayer* v. *Maſterman*, *Ambl.* 344. *Wright* v. *Pearſon*, *Ambl.* 358. *Auſtin* v. *Taylor*, *Ambl.* 376. and *Jones* v. *Morgan*, 1 *Bro. Chanc. Caſ.* 206. It is clear that the teſtator did not intend the eſtate to go over ſo long as there ſhould be iſſue of his ſon *John Poole*. But if the iſſue of *John Poole* were to take as purchaſers, then if *John Poole* had had a ſon, and that ſon had died leaving a ſon, the eſtate upon the death of *John Poole* would have gone over to the daughter of the teſtator. The caſe of *Robinſon* v. *Robinſon*, 1 *Bur.* 38. ſhews the extent to which Courts will go in giving an eſtate tail, in order to effectuate the general intention of a teſtator; and alſo *Doe* d. *Dodſon* v. *Grew*, 2 *Wilſ.* 322. Thoſe two caſes are recogniſed, and the principle upon which they proceeded was acted upon in *Doe* d. *Candler* v. *Smith*, 7 *T. R.* 531. and *Doe* d. *Cock* v. *Cooper*, 1 *Eaſt*, 229. It is remarkable, that in the ſubſequent deviſe to *Anderton Poole* for life, the teſtator, after the limitation to truſtees to preſerve contingent remainders, expreſsly limits the eſtate to the firſt and every other "ſon and ſons" of the body of the ſaid *A. Poole* in the uſual manner; when therefore he wiſhed to give an eſtate for life and deſignate the ſubſequent takers, it is evident that he knew how to expreſs himſelf. The caſe of *Goodtitle* d. *Sweet* v. *Herring*, 1 *Eaſt*, 264, which may perhaps be urged as an authority againſt the Plaintiff, is very diſtinguiſhable from this; for the teſtator there employed words which very plainly ſhewed that he meant to uſe the words "heirs male of the body" in the ſenſe of ſons, and not in their uſual ſenſe; and it was therefore holden, upon the authority of *Lowe* v. *Davis*, 2 *Ld. Raym.* 1561. that as the teſtator had explained the meaning of the

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word "heirs," by ſubſequent expreſſions, that word muſt be taken in the ſenſe which he had aſſigned to it. But in the preſent caſe there are no words to denote an intention to uſe the words "heirs of the body" in a different ſenſe from that which the law puts upon them. In the limitation to the ſecond, third, and other ſons, it is obvious that the words "ſuch ſons" refer to thoſe ſecond, third, and other ſons, and not to the heirs of the body of thoſe ſons; under that part of the deviſe therefore thoſe ſons muſt have taken an eſtate tail; and as it cannot be contended that the limitation to the firſt ſon is to be conſtrued differently from the limitation to the other ſons, he muſt alſo take an eſtate tail, though the words "ſons" in the plural number, which follows the limitation to him, does not ſeem to have any appropriate application. The expreſſion "as the elder of ſuch ſons," &c. appears to have been inſerted by ſome miſtake in the firſt limitation, as one ſon only had been mentioned, though the ſame expreſſion has an appropriate application in the limitation which follows.

Lens Serjt. *contrà*. It may be admitted as a general rule, that neither the deviſe of an expreſs eſtate for life to the firſt taker, nor the interpoſition of a deviſe to truſtees to preſerve contingent remainders, if followed by a deviſe to the heirs male of the body of the firſt taker, will prevent him from taking an eſtate tail. It is not neceſſary therefore to comment upon any of the caſes which have been cited to this point. The only queſtion here is, Whether the words "heirs male of the body" have not been ſo explained by the teſtator that they muſt in this will be conſtrued to mean firſt and other ſons. The caſes of *Lowe* v. *Davis* and *Goodtitle* v. *Herring* admit that the words "heirs male of his body," if unexplained, import an eſtate tail, but eſtabliſh this further rule, that if the teſtator appear to have put a different ſenſe upon them by uſing them as ſynonimous to ſon or ſons, the ſenſe ſo put upon them muſt prevail. Here the teſtator in his deviſe to his firſt ſon and the heirs male of his body applies the words "ſuch ſons" to "heirs male of his body," there being no other antecedent to which thoſe words can be applied; he therefore conſiders the latter expreſſion as ſynonimous with the former; and having put this ſenſe upon it, the Court muſt take it in that ſenſe. Unleſs therefore that part of the firſt deviſe be rejected reſpecting the preference of the elder to the younger ſons, the Court muſt take the teſtator to have given only an eſtate for life to *John Poole*, with re-

mainder to his ſons in ſucceſſion as purchaſers. Nor is there any ground upon which theſe words can be rejected; for before this can be done, it ought to be ſhewn that they are inconſiſtent with the reſt of the will. It may be ſaid indeed, that under the words, of deviſe to the ſecond, third and other ſons, thoſe ſons would take an eſtate tail, ſince the words "ſuch ſons," which follow in that deviſe, are not applicable to the heirs male of the body of thoſe ſons, but to the ſons themſelves. But it is a general rule, that where the teſtator has affixed a definite meaning to any particular expreſſion, that meaning muſt prevail until he ſhews an intention to deſert it. As therefore the teſtator has ſhewn an intention in the preceding clauſe to uſe the words "heirs male of the body" in the ſenſe of ſons, the ſame meaning muſt be given to the ſame words in this clauſe.

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On this day the opinion of the Court was delivered by

Lord ALVANLEY Ch. J. In giving our opinion upon this caſe, we ſhall conſider the ſeveral deviſes in the will of *James Poole* as if they had been deviſes of legal inſtead of equitable eſtates; in ſhort, as if they had been to the uſe of the ſeveral deviſees inſtead of being deviſes in truſt for the ſeveral deviſees, and had therefore conveyed immediate legal eſtates to the ſeveral perſons ſpecified. The firſt limitation in the will is for the uſe of his firſt ſon by his wife *Lucy*, begotten or to be begotten, for and during his life, then upon truſt to preſerve contingent remainders, and after the death of ſuch firſt ſon, to "the ſeveral heirs male of ſuch firſt ſon lawfully iſſuing, ſo as the elder of ſuch *ſons*, and the heirs male of his body, ſhall always be preferred and take before the younger and the heirs male of his body." The firſt part of this limitation is to the firſt ſon only of the teſtator for his life, not comprizing any other ſons. So that the words "ſuch ſons" uſed in the ſubſequent part of the ſame limitation, can only apply to the heirs male of the body of his firſt ſon. The teſtator then proceeds to deviſe, for want of ſuch iſſue, to his ſecond, third, fourth, and all and every other ſon and ſons for their reſpective lives, then in truſt to preſerve contingent remainders, and after their reſpective deceaſes, to the heirs male of their reſpective bodies lawfully iſſuing, "ſo as the elder of ſuch ſons, and the heirs male of his body, ſhall always be preferred and take before the younger of the ſame ſons, and the heirs male of his or their body or bodies."

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Now in this ſecond limitation it is perfectly clear that the words "ſuch ſons" can only refer to the ſons of the teſtator, for there is nothing in that limitation to which theſe words can relate, except thoſe very ſons whom he had before mentioned in the plural number. This deviſe therefore is the ſame in effect as that in *Bagſhaw* v. *Spencer*, 2 *Atk.* 246. 570. The teſtator then proceeds to the limitations in favour of his daughters, and after giving them eſtates for life, with remainder to truſtees to preſerve contingent remainders, remainder to the heirs male of the bodies of his daughters, provides that the elder of his daughters and the heirs male of her body ſhould be preferred to the younger and the heirs male of their bodies. After ſome intermediate proviſions reſpecting the eſtates deviſed, the teſtator, on failure of ſuch iſſue as before mentioned, deviſes to his nephew *Thomas Poole*, then reſiding in the *Eaſt Indies*, for life, then to truſtees to preſerve contingent remainders, then to his nephew *Anderton Poole* for life, then to truſtees to preſerve contingent remainders, and after the death of *Anderton Poole*, to the firſt and every other ſon and ſons of the body of *Anderton Poole* lawfully to be begotten, ſucceſſively as they ſhall be in priority of birth and ſeniority of age, and the ſeveral heirs of their reſpective bodies lawfully iſſuing, ſo as the elder of ſuch ſons, and the heirs of his body ſhall always be preferred and take before the younger of the ſame ſons and the heirs of his and their bodies. This limitation is followed by another preciſely ſimilar in favour of another nephew. On theſe latter limitations no doubt can be entertained: for the will is technically expreſſed ſo as to convey eſtates tail to the ſons of the firſt takers. The diſtinction which ariſes upon the face of this will is, that the teſtator, after the deviſe to his eldeſt ſon, has added words which are improper if the deviſe to that ſon be of an eſtate for life; but with reſpect to the deviſe to the ſecond, third, and other ſons, the words ſuperadded only point out the ſame eſtates as they would neceſſarily take under the words of the deviſe, namely, eſtates tail. In the limitations to his nephews the teſtator has employed the very words that a conveyancer would adopt. The difficulty ariſes upon the uſe of the words in the firſt limitation "ſo as the elder of ſuch ſons and the heirs male of his body ſhall always be preferred," &c. only one ſon having been previouſly mentioned. It is contended, that according to the rule which has prevailed in caſes of this kind, it muſt be holden

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holden that the teſtator meant to reſtrain the general ſenſe of the words "heirs male," and not to employ them as words of limitation. I will not give any opinion whether, if this clauſe had ſtood alone, unexplained by other parts of the will, ſuch might not have been the proper conſtruction. On that point the Court wiſh to avoid any determination. Indeed, if this had been a ſingle limitation to a ſtranger, the conſtruction would have depended much upon the liberality with which the Judges might be diſpoſed to conſider it. But it appears to me, that in conſtruing limitations of this ſort the courts have never deviated from the general rule, which gives an eſtate tail to the firſt taker where the deviſe to him is followed by a limitation to the heirs of his body, except where the intent of the teſtator has appeared ſo plainly to the contrary that no one could miſunderſtand it. In this caſe, however, when the limitation upon which the difficulty ariſes is connected with the other limitations in which he has uſed the ſame words clearly without intending that the heirs of the body ſhould take by purchaſe, it would be ſtrange to ſuppoſe he intended the heirs in this limitation to take as purchaſers. I take the rules reſpecting the conſtruction of words in wills to be plain and well ſettled. Words are always to be taken in their ordinary ſenſe, unleſs the teſtator has demonſtrated an intention to put a different ſenſe upon them. Now the words employed in the firſt deviſe are clearly, in their ordinary ſenſe, words of limitation. Another rule in the conſtruction of wills is, that neither an intent manifeſted by the teſtator to give only an eſtate for life, nor the interpoſition of truſtees to preſerve contingent remainders, nor mere words of condition deſcribing the order of ſucceſſion in which the deviſes are to take place, nor the introduction of powers of jointuring, or of liberty to commit waſte, are of themſelves ſufficient to vary the technical ſenſe of the words uſed. It muſt plainly appear that the teſtator did not mean to give ſuch an eſtate as would paſs under the words uſed, unleſs controuled by ſuch apparent intent. My brothers agree with me in thinking, that this rule muſt be rigidly obſerved. In this caſe there are no circumſtances to alter the meaning of the words. It is altogether unneceſſary for me to examine the numerous caſes that occur in the books; particularly as they are well collected by Mr. *Fearne* in his Treatiſe on Contingent Remainders, by Mr. *Hargrave* in his treatiſe on the rule in *Shelley*'s caſe, and in the note in *Hargrave* and *Butler*'s edition of *Co. Litt.* where the rule laid down in that caſe is diſcuſſed.

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cuſſed. It only remains for me to apply the eſtabliſhed rules of conſtruction to the limitations of this caſe, with a view to enquire whether the words upon which the queſtion turns are to be conſidered as words of purchaſe or not. In order to give effect to the argument for the Defendant, it would be neceſſary to hold that the teſtator meant to give a different eſtate to his eldeſt ſon from that which all the limitations ſhew that it was his intention to give to his other ſons and to his daughters. It is inſiſted, however, that this muſt be the caſe in conſequence of the particular words uſed by the teſtator in the limitation in queſtion. It is clear that the daughters muſt take an eſtate tail, for there are no words of refereuce in the limitation to them by which the words "heirs male of their bodies" can be made words of purchaſe. Are we then to ſuppoſe that the words in queſtion were inſerted in the firſt limitation by deſign, and that they were omitted in the limitation to the daughters by miſtake? It is not poſſible to ſuppoſe that he meant any ſuch thing, nor have we any right to inſert words which he has not uſed. Beſides, where he limits the remainder to his nephews he ſays "in failure of *ſuch* iſſue by me as aforeſaid and not otherwiſe" the eſtate ſhall go over. If then the heirs male of the body of the firſt ſon muſt be taken to mean ſons, the eſtate, under the ſtrict words of this will, muſt go over, though ſuch firſt ſon ſhould leave a grandſon; and yet it could ſcarcely have been ſo intended by the teſtator. I deſire it may be obſerved that we rely on the words uſed throughout the will, whether the teſtator was giving to his ſons, his daughters, or his nephews; and it will then be ſeen whether, conſiſtently with the caſes, we could put that conſtruction upon the words in the firſt limitation, which the Defendant contends for. The caſe of *Goodtitle* v. *Herring*, which was cited on the part of the Defendant, is certainly a caſe of great authority, ſince it went up to the Houſe of Lords. The Court, in commenting upon that caſe, admitted the rule to be eſtabliſhed, ſince the caſes of *Colſon* v. *Colſon* (*a*), and *Perring* v. *Blake*, that if an eſtate of freehold be given to a man, and either mediately or immediately, in any part of the ſame inſtrument an eſtate is limited to the heirs of his body, he would take an eſtate tail. But they thought that the rule was not ſo rigid as to preclude the teſtator himſelf from explaining the words uſed, and

(*a*) 2 *Str.* 1125. and 2 *Atk.* 246.

Lord *Kenyon* cited the cases of *Law v. Davis* and *Doe* v. *Laming*, where they were so explained. The Court thought that the words "heirs of the body" might admit of explanation, and that the words there used were sufficiently explanatory. The case of *Goodright* v. *Pullyn*, 2 Ld. *Raym.* 1437. was decided by the same Judges who decided *Law* v. *Davis*. The devise there was to *Nicholas Lisle* for life, and after his decease to the heirs male of the body of the said *Nicholas*, lawfully to be begotten, and his heirs for ever; but if the said *Nicholas* should happen to die without such heir male, then over. The Judges were unanimously of opinion that it was an estate tail in *Nicholas Lisle*; and Lord *Raymond*, in reporting the decision says, "they all held that the operation of the plain and clear words of a settled rule of law should not be defeated or broken into by uncertain or doubtful words, which they took the last at least to be; but in effect the words heirs males must be rejected to make this an estate for life in *Nicholas*." If then the Court in that case would not suffer the rule of law to be broken in upon, we could not be justified in so doing here where we cannot see a plain intention to vary the construction which the law puts upon the words "heirs male of the body" used in this case.

The following Certificate was afterwards sent to the Lord Chancellor.

This cause has been argued before us in the absence of Mr. Justice *Chambre*, who was indisposed. We have considered it, together with the will of *James Poole*, and are of opinion, that if the devises contained in the said will to the children of the testator and their issue had been devises of legal estates, *John Poole*, the only son of the testator, would have taken an estate in tail male, there not appearing upon the whole will together sufficient indication of the testator's intention to restrain the legal effect of the words "heirs male of the body," and to convert them into words of purchase.

ALVANLEY.
J. HEATH.
G. ROOKE.

Feb. 10 h.

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In *assumpsit* the Plaintiff declared on an agreement by the Defendant not to avail himself or take any undue advantage of a communication made to him by the Plaintiff, of an invention for which the Plaintiff intended to take out a patent, and assigned as a breach, that the Defendant fraudulently obtained a patent for the invention in his own name. Evidence that the Defendant fraudulently obtained a patent in his own name which the Plaintiff afterwards agreed should remain in the Defendant's name upon certain terms, which terms the Defendant before the commencement of the action had renounced, insisting upon the invention as his own, was held to maintain this breach.

If a party agree not to do some specified act under a "penalty" of 100*l.* such sum cannot be considered in the nature of liquidated damages.

ASSUMPSIT. The declaration stated, that before the making of the promises, &c. the Plaintiff had contrived various articles in the business of a saddler, which he fully conceived to be new and valuable improvements; and in particular he had before then invented a certain spring apparatus for girthing saddles, and at the time of making the promises, &c. the Plaintiff was desirous of obtaining his Majesty's letters patent for the sole use and benefit of the said invention for a certain term to be specified in the said letters patent, of which the Defendant had notice, and whereas the Defendant was desirous of being made acquainted with the nature of the said invention, in consideration of the premises, and also in consideration that the Plaintiff would communicate the nature of the invention to the Defendant, the Defendant undertook that he would not avail himself or take any advantage of such communication under the penalty of 1000*l.* It then averred, that the Plaintiff, confiding in the Defendant's promise, did communicate to him the nature of the said invention, but that the Defendant, not regarding, &c. but intending to injure the Plaintiff wrongfully, &c. disclosed and made known the nature of the said invention, and obtained his Majesty's letters patent for the sole use and benefit of the said invention for the term of fourteen years, as being the invention of him the Defendant, and thereby availed himself and took an undue advantage of the communication made to him as aforesaid; whereby the Defendant became liable to pay 1000*l.* according to his agreement; yet that the Defendant had not paid, &c.

The second count was the same as the first, with the addition of an allegation that the Plaintiff sustained special damage by being prevented from taking out letters patent in his own name, and thereby lost great profit.

Plea *non assumpsit.*

The cause was tried at the *Guildhall* Sittings after *Michaelmas* Term, before Lord *Alvanley* Ch. J. when it was proved that the Plaintiff having invented the spring apparatus mentioned in the declaration, the Defendant called upon him, and expressed himself extremely desirous to be informed of the nature of the invention;

that

that the Plaintiff communicated the invention to the Defendant upon his ſigning the following agreement: "*Thomas Smith*, of No. 119, *New Bond Street*, ſadler, having contrived various articles in the above branch he fully conceives to be new and valuable improvements, Mr. *Robert Dickenſon*, of No. 55 *Long Acre*, being deſirous of being made acquainted with one of the above mentioned improvements, which Mr. *D.* fully comprehends under the title of ſpring apparatus to anſwer or produce the ſame effect as thoſe for which Mr. *Robert Dickenſon* has already obtained the King's patent, he, *Robert Dickenſon*, doth hereby promiſe and bind himſelf not to avail himſelf or take any advantage of ſuch communication under the penalty of breach of honour and 1000*l.*" That the Defendant, immediately on getting this information, entered a *caveat* againſt any perſon but himſelf taking out a patent for the above invention, and ſhortly after took out a patent for it in his own name, though it had been agreed between him and the plaintiff, that they ſhould jointly ſhare the profits of the invention, but that the patent ſhould be taken out in the name of the Plaintiff. That the Defendant being unable to make out a ſpecification in order to maintain his patent, obtained another interview at a houſe in *Soho Square* with the Plaintiff, at which it was agreed that they ſhould be jointly concerned in the invention, the Plaintiff being employed to make all the ſaddles; and that the patent which had been taken out in the name of the Defendant ſhould ſtill continue in his name. That upon the faith of this agreement the Plaintiff aſſiſted in making out the ſpecification, which was duly enrolled. That the Plaintiff ſhortly after finding the Defendant was uſing the patent for his own benefit ſolely, wrote to him upon the ſubject, and received from him the following anſwer: "Sir, I am unconſcious of any contract at preſent between us, nor can Mr. *N.* or Mr. *F.* (two perſons who had been at the interview when the ſpecification was drawn out) help me to the recollection of any, although you refer me to them for that purpoſe. The two inventions for which I have obtained patents are my own inventions. Prior to my giving you a paper not to practiſe any invention you might communicate I had depoſited a drawing in the hands of a friend, and had a workman actually employed in making the article for which my laſt patent is obtained, and this drawing was depoſited for the purpoſe of proving, ſhould it be neceſſary, what

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my design and invention consisted of prior to any communication from you, lest even if it should be the same, I might still go on to obtain my patent. How far your invention resembled mine is of no consequence. I went on with my own. Your communication had in it nothing new, therefore I do not consider myself as using your invention but my own." Upon this case it was objected by the counsel for the Defendant, that the *gravamen* laid in the declaration did not correspond with that which was in evidence before the jury; but his Lordship refused to nonsuit the Plaintiff, and the jury found a verdict for the Plaintiff for 300*l.*, the Defendant agreeing to assign the patent to the Plaintiff for the remainder of the term at the Defendant's own expence. The Plaintiff was to be at liberty to enter a verdict for 1000*l.* if the Court should be of opinion that the sum of 1000*l.* mentioned in the agreement was in the nature of liquidated damages, and not a penalty; and if the Court should be of opinion that the Defendant had not taken an undue advantage of the Plaintiff a nonsuit was to be entered.

Accordingly a rule *nisi* for a nonsuit one the one side, and for increasing the verdict on the other, having been obtained on a former day,

Best Serjt. now contended that the *gravamen* in the declaration was supported by the evidence; for that although the Plaintiff by his conduct and his agreement at the time when he assisted in making out the specification had waved any remedy for the Plaintiff's misconduct in fraudulently obtaining the patent in his own name, yet that he had only waved it upon the condition of the Defendant's fulfilling the agreement which was entered into at that time; that the Defendant having now renounced that agreement by his letter, the Plaintiff's remedy revived for the Defendant's original misconduct in obtaining the patent in his own name. He next insisted that the sum of 1000*l.* stipulated by way of penalty was in the nature of liquidated damages, and consequently the Plaintiff was entitled to have the verdict entered for that amount.

But *The Court* expressed themselves clearly of opinion that the word "penalty" used in the agreement effectually prevented them from considering the sum mentioned as liquidated damages.

Shepherd and *Bayley* Serjts. *contrà*, urged that the Plaintiff's action could not be maintained on this Declaration, since it was evident that whatever injury he might originally have sustained by

the Defendant's conduct, in taking out a patent, yet, that having ſubſequently aſſented to that act of the Defendant, he could not now make it the ground of an action, but ought to have declared upon the new agreement; and that in fact the Plaintiff could not ſuſtain any damage by the mere act of the Defendant in taking out the patent in his own name, for that without the Plaintiff's ſubſequent aſſiſtance in making out the ſpecification, the patent would have been of no avail.

Lord ALVANLEY, Ch. J. This is an action for the breach of an agreement; and the queſtions are, firſt, Whether the evidence proved that the Defendant took any undue advantage of the communication made to him by the Plaintiff; and ſecondly, Whether the advantage taken by the Defendant, ſuppoſing it to be an undue advantage, correſponds with the breach laid in the declaration? It appears that the Defendant came to the Plaintiff in order to obtain a knowledge of his invention, and was extremely anxious that ſome terms ſhould be entered into between them; and at the ſame time he agreed not to take any undue advantage of the communication made. It was then underſtood that the patent was to be taken out in the name of the Plaintiff. Let us ſee then what was the firſt uſe which the Defendant made of his knowledge, there being at that time no contract in exiſtence between them reſpecting any participation of profit in the invention. He immediately enters a *caveat*, to prevent any other perſon but himſelf from taking out a patent. This was an improper uſe made of the diſcovery, upon which the Plaintiff might have brought an action, though it is uncertain what damages he could have recovered. The Defendant then obtains a patent in his own name, but being unable to make out the ſpecification, he tempts the Plaintiff, under pretence of offering him certain advantages, to complete the diſcovery. This was only a continuation of the ſame fraud; for as ſoon as he has made out his ſpecification from the information afforded him by the Plaintiff, he refuſes to execute any articles of partnerſhip, alleging that he had obtained the patent upon a ſpecification previouſly depoſited in the hands of a friend. It is urged that the Plaintiff agreed to releaſe all breach of the firſt agreement, not to take any undue advantage of the communication, upon the Defendant entering into certain terms, and that the Defendant is only guilty of a breach of thoſe terms. Poſſibly thoſe terms never

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were reduced into writing, and yet the Plaintiff is called upon to wave his remedy on the firſt agreement, without any power of enforcing the ſecond. It does appear to me however, that although, if there had been a formal releaſe of the remedy under the firſt agreement he muſt have been barred, yet as the patent was allowed to remain in the name of the Defendant only, upon the performance of certain conditions, the performance of which has not been ſhewn, the Plaintiff may reſort to the breach of the firſt agreement, of which the Defendant appears, by the evidence, to have been guilty. Indeed the Defendant's letter to the Plaintiff puts the queſtion out of all doubt, for he there inſiſts upon the invention as his own, and repudiates any ſubſequent agreement, and juſtifies having taken out the patent in his own name as for an invention of his own. If a man give a bond for the performance of covenants, and the covenants being broken, the obligee agrees not to put the bond in ſuit upon the undertaking of the obligor to do certain things, and then the obligor refuſes to perform his undertaking, can it be ſaid that the bond is gone? Certainly not. So in this caſe, the ſubſequent agreement was a conditional agreement, and as the conditions were not performed, the action may be maintained upon the original agreement.

HEATH J. I think the agreement upon which the declaration is founded is a ſubſiſting agreement: and that the Defendant, by entering the *caveat*, and taking out the patent in his own name, committed a breach of that agreement, there can be no doubt. It is inſiſted that the Plaintiff waved the breach of this agreement, and certainly he might have done ſo. But I think that his conduct has been very well explained; for it appears that the Defendant, with reſpect to this ſecond agreement, was practiſing a mere fraud upon the Plaintiff, and amuſing him by a ſham treaty for a partnerſhip which he never intended to carry into effect. It would be very hard to refer the Plaintiff to the ſecond agreement, of the terms of which there is no evidence, but only of a treaty for an agreement. It appears to me therefore that the firſt agreement was not waved by the treaty for the ſecond agreement, which the Plaintiff was induced to enter into by the fraud of the Defendant.

ROOKE J. The only queſtion is, Whether the Plaintiff, by the ſtrict rule of law, is prevented from recovering for the breach of

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the first agreement; for there can be no doubt that the first agreement was *broken*. That fact was sufficiently proved by his entering the caveat, and taking out the patent in his own name, immediately after the disclosure of the invention; and that breach appears to me to be both well alleged and proved. It is insisted, however, that the Plaintiff must be nonsuited on the ground of the second agreement; but before the Defendant is entitled to nonsuit the Plaintiff on the ground of the second agreement he must prove that agreement, whereas his own letter disavows all agreement with the Plaintiff upon the subject of the patent, and insists upon his own right to the invention.

Rule discharged.

Feb. 13th.

The Warden and College of the Souls of all faithful People deceased of OXFORD *v.* COSTAR and Another.

Buildings of a college in one of the universities taken into and made part of the college between the passing of the first land tax act, and the act which made that tax perpetual, are exempted from the land tax. But where a college, soon after the passing of the first land tax act, purchased land of a parish under a private act of parliament, which provided that the college should pay all taxes which the premises then were, or should thereafter be subject to, it was held that the lands purchased were not exempted from the land tax.

THIS was an action of trespass, and the declaration contained three counts; the first was for seizing and carrying away, on the 1st *January* 1803, two reading desks belonging to the Plaintiffs; the second for seizing and carrying away, on the 2d *January* 1803, two chairs belonging to the Plaintiffs; and the third for seizing and carrying away two tables also belonging to the Plaintiffs; the Defendants pleaded the general issue, and the cause came on to be tried before Mr. Justice *Chambre* at the *Lent* assizes for *Oxford* 1803, when a verdict was found for the Plaintiffs with 1*s.* damages upon each count, subject to the opinion of the Court on the following case:

In the land tax assessment of the parish of *Saint Mary the Virgin* in the city of *Oxford* for the year 1798, *All Souls College* was assessed by the Commissioners of the city of *Oxford*, in the several sums of 9*l.* 14*s.* 9*d.* for certain premises called in the assessment, *All Souls Kitten Court*; 6*l.* 13*s.* 3*d.* for certain premises called late *Wards*; and 3*l.* 16*s.* 10½*d.* for about one-third of the *Warden*'s *lodgings*. All the premises so assessed are locally situate in the city of *Oxford*.

The premises for which the College is assessed at 9*l.* 14*s.* 9*d.* formely belonged to the parish of *Saint Mary*. In the year 1715, an act of parliament passed, which, after reciting that certain feoffees

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of the parish of *Saint Mary* were seised of the above premises in fee simple, in trust for the use of the church and the poor of the said parish, and had demised them for certain terms and at certain yearly rents, enacted, That all the said premises should be vested, estated and settled in the Warden and College of *All Souls* and their successors for ever, to be converted to what use they should think fit, and freed and discharged from all estates, uses, trusts, agreements, conditions, powers, charges, and incumbrances whatsoever, the said Warden and College paying certain yearly rents to the use of the church and poor of the said parish, and for which a right of entry and power of distress was reserved to the feoffees. The above act of parliament contains the following clause: "And "be it further enacted, That the said Warden and College, and "their successors for ever, shall pay and discharge all taxes which "are or at any time hereafter shall be imposed upon the premises "hereby vested in them by authority of parliament." The same act also authorises the parishioners of the said parish to enter the College on Ascension-day yearly, and pass through the same to make their perambulation, and take in the bounds and limits of the said parish by the way and passage which had been for that purpose theretofore accustomed. At the time of the passing the above act, two tenements stood on part of these premises; another part thereof, being at that time an orchard, was then in lease to, and in the possession of the College. Soon after the passing of the act, the College took down the before-mentioned tenements, and erected on the premises their present library, which is contiguous to other buildings of the College within the same inclosure, and kept for the use of the College as other parts of the College are. Before and at the time of passing of the said act, these premises were assessed to the land tax in the said parish of *Saint Mary* by the commissioners of the city of *Oxford*, and since the passing of the said act, *All Souls College* has constantly been rated in the same manner, and has paid the land tax assessment for these premises up to the period of the now disputed assessment.

The premises for which the College is assessed at 6*l.* 13*s.* 3*d.* were formerly the scite of an old house in the occupation of one *Ward*, consisting of a dwelling house and other buildings, with the appurtenances adjoining to the *College of All Souls*. In 1783, the College, having purchased the fee of the said house and premises,

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pulled down all the buildings, and laid part of the premiſes into the garden, then and ſtill occupied by the Warden of the ſaid College with his lodgings, and erected on a part thereof ſome neceſſary out-door offices for the uſe of the Warden, and a wall where the front of the ſaid houſe ſtood towards the High-ſtreet, with a gateway therein, through which alone the Warden, to whom theſe premiſes have been allotted by the College, has ſince had a communication to and from the ſtreet with his ſtables and other back buildings of the College allotted by the College for the ſeparate uſe of the Warden. The Warden's garden into which part of the premiſes was laid, as before-mentioned, is part of the ancient ſcite of the College. Previous to the year 1783, and before *Ward*'s tenement was pulled down, the wall of the ſame, on the weſt ſide, formed the eaſtern boundary of the College and of the Warden's garden coming cloſe up to the Warden's lodgings and garden, but to prevent a communication with any houſes in the High-ſtreet, and to keep the College detached from any buildings but its own, the ſaid tenement was pulled down and laid to the College in ſuch manner that the wall and building of the next adjoining tenement to the eaſt of *Ward*'s premiſes, do now and have ſince the year 1783, formed the ſole incloſure of the College and the ſaid garden towards the eaſt, being connected on the ſouth with the Warden's lodgings by a ſingle wall in front, in which is the gateway to the High-ſtreet aforeſaid. For theſe premiſes *All Souls College* has conſtantly been rated to the land-tax in the ſaid pariſh of *Saint Mary* by the city commiſſioners, as the former owners of the ſaid premiſes previouſly were, and has paid the aſſeſſments up to the period of the now diſputed aſſeſſment.

The premiſes for which the College is aſſeſſed at 3*l.* 16*s.* 10½*d.*, form about one-third part of the Warden's lodgings. By indenture of the 4th *April* 1704, between the feoffees of the pariſh of *Saint Peter in the Eaſt* and the *Warden and College of All Souls*, the former, after reciting a demiſe to themſelves from the corporation of *Oxford* of a meſſuage or tenement (the ſpot on which the premiſes in queſtion ſtand), for 99 years, and that the Warden and College had lately purchaſed the remainder of a term of 40 years in the meſſuage or tenement granted by the above-mentioned feoffees to one *Joan Fry*, with intent to pull down the ſame, and with the conſent of the ſaid feoffees to erect a new building in the room thereof,

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thereof, to be laid to and accounted as part of the ſcite of the College or Manſion-houſe, demiſed the ſaid meſſuage and premiſes to the Warden and College for the term of 90 years at a certain rent, with a clauſe of re-entry for non-payment thereof. In this deed there is a covenant on the part of the Warden and College, to pay the ſum of 14*l.* every fourteen years for a fine, and a covenant by the feoffees to renew with the corporation of *Oxford*, and within one month after requeſt made at any time thereafter, to demiſe to the Warden and College for a like term of 90 years, under the like fines, rent, and covenants. Soon after the date of the above-mentioned indenture, the College pulled down the buildings then ſtanding on the premiſes hereby demiſed, and erected thereon a part of a dwelling houſe which is now and has been ever ſince allotted to and occupied by the Warden of the College as his lodgings, he paying no rent for the ſame. The remainder of the ſaid houſe is built upon part of the old ſcite of the College, and is connected with the old buildings thereof. The fine of 14*l.* has been regularly paid every fourteen years, and on the requeſt of the Warden and College, a new leaſe of 90 years has lately been granted to them under the ſame covenants and conditions, and under which leaſe they now hold the premiſes in queſtion. For theſe premiſes *All Souls College* was rated to the land-tax in the pariſh of *Saint Mary*, by the commiſſioners of the city, in the year 1704 and 1705 reſpectively, by the deſcription of Mrs. *Weſt*'s houſe which belongs to *All Souls College*, and paid ſuch aſſeſſment; but from that time until the now diſputed aſſeſſment, the College has not been aſſeſſed to the land-tax for theſe premiſes by the city commiſſioners in the pariſh of *Saint Mary*. Separate commiſſioners for the land-tax are appointed for the city of *Oxford*, and the ſum impoſed upon the Univerſity is raiſed by an aſſeſſment made by the Univerſity commiſſioners upon the ſeveral Colleges and Halls in certain proportions ſettled amongſt the heads of houſes in reſpect of the ſaid Colleges and Halls. All the premiſes before mentioned were ſituate in the pariſh of *Saint Mary* at the times when they came into the poſſeſſion of the College, and nothing has been done to take them out of that pariſh, unleſs the facts before-mentioned can be conſtrued to have that effect.

The Defendants, as land-tax collectors for the ſaid pariſh of *Saint Mary*, after demand made upon the Plaintiffs, and refuſal to

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pay the ſeveral ſums above mentioned, regularly diſtrained and took under a regular warrant of diſtreſs, the ſeveral articles ſtated in the declaration, on the ſeveral days therein mentioned, *viz.* the goods in the firſt count mentioned for the firſt mentioned rate of 9*l.* 14*s.* 9*d.*; the goods in the ſecond count mentioned for the rate ſecondly above mentioned of 6*l.* 13*s.* 3*d.*; and the goods in the third count mentioned for the laſt mentioned rate of 3*l.* 18*s.* 10½*d.*

The counſel for the Defendants offered evidence to prove, that in the courſe of the laſt century ſeveral houſes and other premiſes ſituate in the city of *Oxford*, and aſſeſſed to the land-tax by the commiſſioners of the ſaid city, have been purchaſed by ſeveral colleges in *Oxford*, and added to thoſe colleges, and occupied by the members thereof, in the ſame manner as the premiſes before mentioned are occupied with reſpect to *All Souls*, and that the ſaid colleges are rated to the land-tax for the ſame by the city commiſſioners, and have conſtantly paid ſuch rates. But this evidence being objected to by the counſel for the Plaintiffs, was rejected by the learned judge.

The queſtion for the opinion of the Court was, Whether the Plaintiffs were liable to be aſſeſſed to the land-tax by the commiſſioners of the city of *Oxford* in reſpect of all, or any, and which of the premiſes before mentioned? and the verdict was to be entered for the Plaintiffs or for the Defendants, upon the ſeveral counts in the declaration, according as the Court ſhould be of opinion that the reſpective aſſeſſments before mentioned were lawful or unlawful. But if the Court ſhould be of opinion that the evidence offered by the Defendants was improperly rejected, then a new trial was to be granted.

This caſe was twice argued; firſt in *Eaſter* Term 1803, by *Vaughan* Serjt. for the Plaintiffs, and *Beſt* Serjt. for the Defendants; and ſecondly in *Trinity* Term in the ſame year, by *Williams* Serjt. for the former, and *Shepherd* Serjt. for the latter. The courſe of argument purſued on the part of the Plaintiffs tended to ſhew, from the hiſtory of the ſeveral land-tax acts, and the alterations in point of expreſſion where the exemption in favour of colleges, halls, and hoſpitals occurred, that it was the intention of the Legiſlature to include within the exemption any buildings newly incorporated into colleges, and forming part of ſuch colleges. The courſe of argument on the part of the Defendants tended to ſhew, from the

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abuſes to which ſuch an exemption was liable, and from the conſequent hardſhips which alterations in the degree of burthen thrown upon the diſtricts reſponſible for ſuch proportion of the land-tax ceaſing to be paid upon lands ſo exempted would introduce, that it was not the intention of the Legiſlature to exempt any thing more than the old ſcites of colleges. It was alſo contended for the Defendants, that at all events the proviſo in the private act of parliament, by which the premiſes aſſeſſed at 9*l.* 14*s.* 9*d.* were conveyed to the College, amounted to a covenant on the part of the College to wave their exemptions and pay the land-tax. But as theſe points were fully diſcuſſed in the judgment of the Court, a more detailed account of the arguments is omitted in this place.

On this day the opinion of the Court was delivered by

Lord ALVANLEY Ch. J. This caſe has been long before the Court; and indeed it has been our wiſh that the land-tax ſhould continue to be paid by the reſpective parties in the ſame manner as it has been paid hitherto. But, notwithſtanding that wiſh, and the hardſhip ariſing from the circumſtance that the clauſe in the old land-tax act, upon which the queſtion turns, has now been made perpetual, it is our duty to decide the caſe according to the ſtrict letter of the law. It was not ſtated at the bar, but I take it for granted, that the city of *Oxford*, upon which a groſs charge is made by the land-tax acts, is divided into pariſhes, each being as it were a diſtrict, and having a ſeparate aſſeſſment. This, however, is not the caſe in all places; for every pariſh in the kingdom does not form a diſtinct diſtrict. I ſhall firſt proceed to conſider thoſe parts of the caſe which apply to the ſecond and the third counts of the declaration. It is to be obſerved, that no acquieſcence on the part of the College in the payment of any particular aſſeſſment can prevent them from availing themſelves of any exemption if ſuch exemption ſhould be found to exiſt. We are to determine, therefore, how far the exemption in the land-tax acts in favour of colleges extends. We have looked into all the acts, as well as into the caſe of *Harriſon* v. *Bulcock*, 1 *H. Bl.* 68., and we are all of opinion that the principle of *Harriſon* v. *Bulcock*, is applicable to colleges as well as hoſpitals. In that caſe the premiſes on which the aſſeſſment was made did not form part of the old ſcite of the hoſpital; and they had been aſſeſſed to the land-tax before they were taken into the hoſpital. The ſame arguments,

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ments, founded upon hardſhip, were there urged which have been reſorted to in this caſe; and indeed the only difference between the two caſes is, that one is the caſe of an hoſpital and the other of a college. Lord *Loughborough*, in commenting upon the words of the land-tax act, obſerves, "that there might be no ambiguity in the word ſcite, the Legiſlature goes on to ſay, *any of the buildings within the walls or limits of the ſaid colleges, halls, and hoſpitals*; none of the buildings therefore within thoſe limits are chargeable." This caſe appears to me deciſive upon the ſubject: but as the preſent is a caſe of conſiderable importance to the univerſities, I think it right to enter rather more at large into the matter. In the 1 *Will. & Mar. c.* 20. which is to be found in the *Appendix* to *Ruffhead's Statutes at Large*, there is a proviſo that the act ſhall not extend to any college or hall in either of the univerſities, or the colleges of *Windſor*, *Eton*, *Winton*, or *Weſtminſter*, or any hoſpitals or alms-houſes, or any free-ſchool, &c. for or in reſpect of the ſcites of the ſaid colleges, &c. or any maſter, fellow, or ſcholar of the ſaid colleges, &c. for or in reſpect of any ſtipend, wages, or profits, &c. nor to charge any houſes or lands belonging to the hoſpitals therein mentioned, or to any colleges or halls in either of the univerſities, or to any hoſpital, alms-houſe or free-ſchool, in reſpect of any rents or revenues payable to the ſaid hoſpitals, &c. applicable to the uſe of the poor. This act, which has been called a land-tax act, differs very materially from the preſent land-tax act, and rather reſembles the property tax, being a charge of one ſhilling in the pound upon all perſonal eſtates, and one ſhilling in the pound upon all landed eſtates. The 4 *Will. & Mar. c.* 1., which is to be found in the Appendix to *Pickering's Statutes*, vol. 12. follows the 1 *Will. & Mar.* with reſpect to the ſcites of colleges and halls, but does not exempt the other lands belonging to them; and all the other land-tax acts, as far as I can collect, run in the ſame words, until the 11 & 12 *Will. & Mar.* which is the foundation of all the ſubſequent acts upon the ſubject. This is the firſt act by which the quotas of the tax are impoſed upon particular diſtricts, and in this act the exemption is extended to the buildings within the walls or limits of colleges, halls, and hoſpitals. The 2 *Ann. c.* 1. further extends the exemption to all lands which on the 25th *March* 1693 did belong to the ſcites of any colleges, &c. The difference of the ſeveral acts amounts to this: the firſt act gave an exemption from the perſonal tax in reſpect of the ſcites, ſalaries, buildings, lands,

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and revenues belonging to all colleges; the 4 *Will. & Mar.* in respect of the scites only; the 11 & 12 *Will.* 3. in respect of the scites and buildings within the limits of colleges, *&c.*; and the 2 *Ann.* adds to this exemption all lands which did belong to the scites of colleges, *&c.* on the 25th *March* 1693. I inclined at first to think that we might put that construction upon the acts which justice seemed to require, and that we might hold that a college was not at liberty to exempt itself by enlarging its own limits. But it seems to me impossible to put so limited a construction upon the word "buildings" as to justify us in deciding that the Legislature has not given an exemption to all buildings which form part of, and are used for the purpose of the college. The words of the 2 *Ann.* which is to be found at large in *Pickering's Statutes*, vol. 23., have been followed down to the present time. Whatever, therefore, now forms part of the College, though it were not originally exempted, must, according to the case of *Harrison* v. *Bulcock*, be taken to fall within the exemption. With respect indeed to any colleges which may have been erected since the land-tax act became perpetual, I shall say nothing; but I think that a college erected after the passing of the first land-tax, and before that which rendered the tax perpetual, would be exempted. This being so, it follows that we must give judgment for the Plaintiff upon the second and third counts; and indeed with respect to that part of the tax which is the subject of the third count, there seems to be no great hardship in so doing, that part of the tax having always been paid by the parish. This circumstance of itself affords a strong proof of the construction which was put upon the 2 *Ann.* at the time when that act was passed. That act passed in 1703, and the purchase by the College of the perpetual lease from the parish of *Saint Peter*'s was made in 1704. Probably indeed the parish were not aware of the clause of exemption when they entered into this contract; and the grant was made without any particular stipulation, leaving the law to operate as it might happen to apply. The consequence was, that as soon as the premises purchased were taken into, and made part of the College, the tax ceased. How sensibly the loss sustained by the parish of *Saint Peter* from this circumstance was felt, may be collected from the clause introduced into the private act of parliament in the year 1715, by which the premises which are the subject of the first count were conveyed to the College by the feoffees of the parish of *Saint Mary*. This being a private act, is,

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in the nature of a conveyance, and muſt be conſtrued *ſecundum ſubjectam materiam*. About ten years before the paſſing of the act, the College had availed themſelves of the exemption with reſpect to the premiſes then purchaſed. In 1715 therefore, when the pariſh agree to convey the premiſes which are the ſubject of the firſt count, they introduce a condition that the College ſhall pay all ſuch taxes as then were, or ſhould thereafter be impoſed upon the premiſes. We are clearly of opinion that this ſtipulation was introduced for the expreſs purpoſe of guarding againſt the very exemption which is now ſet up. It is ſaid that the act only compels the College to pay ſuch taxes as the premiſes are liable to by law when in their occupation. But we think that the intention of parliament was that the College ſhould pay all ſuch taxes as the premiſes were liable to at the time when they were purchaſed. Then what has been the conduct of the College? For nearly 100 years they never claimed the exemption. They were conſcious that they ſtipulated to the contrary. We think therefore that by the proviſo in the act of 1715, the college meant to charge themſelves with the payment of the land-tax, and although without ſuch proviſo they might have been exempted, yet we muſt conſider them as having renounced the benefit of that exemption, according to the maxim *quiſque poteſt renuntiare juri pro ſe introducto*. On theſe grounds we are of opinion, that a verdict muſt be entered for the Defendant upon the firſt count, and for the Plaintiff upon the ſecond and third counts.

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J. A. deviſed all his lands to *S. A.* (his ſon by the firſt venter) when he ſhould come to the age of 21 years, but if he ſhould die before 21 years, and *D. A.* (teſtator's daughter by the ſecond venter) ſhould be then living, he gave the ſame to her when ſhe ſhould attain 21 years. Teſtator died, and then *S. A.* died under age and without iſſue. Held that on the death of *S. A.* the inheritance veſted in *D. A.* his ſiſter of the half blood in preference to his uncle of the whole blood.

EJECTMENT to recover certain premiſes at *Gainſborough* in the county of *York*. On the trial at the laſt *York* aſſizes, before *Thompſon* Baron, a verdict was taken for the Plaintiff, ſubject to the opinion of this Court, on the following caſe. *Joſeph Andrew* being ſeiſed in fee of the premiſes in queſtion, by his will, dated the 30th *December* 1779, and properly atteſted, deviſed *inter alia* as follows: "Firſt, I will that my juſt debts and funeral ex-

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pences be discharged, then I give and bequeath to my daughter *Deborah Andrew* the sum of 100*l.* to be paid to her when she comes to the age of 21 years, but if she should die before that she comes to the age of 21 years I give the same to my son *Stephen Andrew*; also I give to my wife *Jane Andrew*, my cow and all my household goods and furniture whatsoever; also I give and bequeath to my son *Stephen Andrew* all my lands and housing, *also all my effects whatsoever*, not otherwise disposed of in my will when he comes to the age of 21 years; but if he should die before he comes to the age of 21 years, and my daughter *Deborah* be then living, I give the same to her when she comes to the age of 21 years, also the interest of the above 100*l.* towards her maintenance until she come to the age of 21 years, provided that she should live. I do make and ordain my son *Stephen Andrew* sole executor of this my last will and testament." The devisor died on the 3d *January* 1780, without having revoked his said will, leaving *Jane Andrew* his widow, (who afterwards married *William Hutton*) the said *Stephen Andrew*, his only son by his former wife *Sarah Andrew*, his heir at law, and an infant of the age of 12 years, and the said *Deborah Andrew*, an infant of the age of three years, by his second wife *Jane Andrew*, him surviving. The personal property of the devisor (after payment of debts, funeral expences, and charges of probate, amounting altogether to 36*l.* 1*s.*) was only 15*s.* 3½*d.*, and the value of the real estate was about 300*l.* *Stephen Andrew*, upon the death of the devisor, entered into the premises in question, and afterwards died in *January* 1785, and under the age of 21 years, intestate and unmarried, leaving *Deborah*, his sister of the half blood. *Isaac Andrew*, the lessor of the Plaintiff, is the uncle and heir at law of the whole blood of *Stephen Andrew*, and is also now the heir at law of *Joseph Andrew* the devisor. Upon the death of *Stephen Andrew*, *Isaac Andrew* his uncle, entered into the possession of the premises in question, and continued to receive the rents and profits thereof during the minority of *Deborah Andrew*, who, upon her attaining the age of 21 years, was admitted into the possession and receipt of the rents and profits of the same premises, and continued in such possession and receipt until her death in 1802. *Deborah Andrew* died without issue, and after she had attained the age of 21 years, duly made and executed her will, and thereby devised the premises in question to her mother, *Jane Hutton* (formerly *Jane Andrew*) the Defendant.

The queſtion for the opinion of the Court was, Whether the leſſor of the Plaintiff was entitled to recover?

Lens Serjt. for the leſſor of the Plaintiff. The firſt queſtion is, Whether *Iſaac Andrew*, the heir at law of the whole blood of *Stephen Andrew*, be entitled to the premiſes in queſtion in preference to the deviſee of *Deborah Andrew*, who was ſiſter of the half blood to the ſaid *Stephen Andrew*? The ſeveral deviſes to *Stephen Andrew* and *Deborah Andrew* not being to veſt until they ſhould reſpectively attain the age of 21 years, were executory deviſes, and until the veſting of one or other of the eſtates limited thereby, the fee deſcended to the heir at law of the deviſor. Upon the death of the deviſor therefore the fee deſcended to *Stephen Andrew*, ſubject indeed to be deveſted by the events of his or his ſiſter *Deborah*'s attaining the age of 21. But as *Stephen Andrew* died before either of thoſe events took place, the fee, which remained in him till his death, deſcended to his uncle of the whole blood *Iſaac Andrew*, in preference to *Deborah Andrew* his ſiſter of the half blood. It is true, that if a man be ſeiſed of an eſtate for life, and after that eſtate a freehold be limited to another perſon, and then the reverſion in fee deſcend to the firſt taker, his poſſeſſion will not convey the inheritance to his ſiſter of the whole blood in preference to his brother of the half blood, for in ſuch caſe it is held, that he never has the reverſion in poſſeſſion, and conſequently the heir muſt claim through his anceſtor and not through him. But in this caſe there was no reverſion exiſting at the death of *Stephen Andrew*, ſince the life eſtates, upon which the reverſon was to depend, had not then ariſen. It is held, that if the heir enter on the death of his anceſtor, and aſſign dower to the widow and die, his ſiſter of the whole blood will only take two-thirds of the eſtate in preference to his brother of the half blood; and the reaſon of this is clear, for as the widow has a freehold eſtate in one third of the whole, nothing but a reverſion of that third remains in him. The exceptions to the rule of *poſſeſſio fratris* have been confined to caſes where an eſtate of freehold has been interpoſed between the poſſeſſion of the firſt taker and the reverſion in fee. In this caſe, no ſuch eſtate having been interpoſed, the rule of *poſſeſſio fratris* muſt prevail, and conſequently *Iſaac Andrew*, the uncle of the whole blood, muſt take in preference to *Deborah*, the ſiſter of the half blood. The eſtate indeed which deſcended to *Stephen Andrew*, being liable to be defeated, may poſſibly be called a baſe fee; but

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it may be doubted whether it ought to be ſo conſidered. There was no conveyance of a limited eſtate in fee; but by the operation of an executory deviſe, the entire fee, which deſcended upon the heir at law, was in a certain event to be transferred to ſome other perſon. But even ſuppoſing the eſtate which deſcended upon *Stephen Andrew* to have been no more than a baſe fee, the rule may ſtill prevail; for there is no authority from which it can be inferred that the rule is confined to a fee ſimple abſolute. Secondly, *Deborah Andrew* took only an eſtate for life under the will. There are no expreſſions from which a larger eſtate can be implied. The words "all my effects whatſoever not otherwiſe diſpoſed of in my will," do not carry any eſtate in the realty. In *Hogan* d. *Wallis* v. *Jackſon*, *Cowp.* 229., where the teſtator gave to his mother "all the reſidue of all the effects both real and perſonal which he ſhould die poſſeſſed of," it was holden, that a fee paſſed to the deviſee; but the addition of the word "real" plainly ſhewed that the teſtator did not mean to uſe the word "effects" in the uſual ſenſe, and upon that word the Court laid great ſtreſs. Independent of which they materially relied upon the introductory words there uſed as ſhewing an evident intention to convey a fee. The preſent caſe is eſſentially different from *Doe* d. *Chilcott* v. *White*, 1 *Eaſt*, 33., in which the teſtator's wife, under a power to deviſe what "ſhe thought proper of her ſaid effects" to her ſiſters for life, was deemed to be empowered to deviſe real eſtates; for in that caſe the teſtator had previouſly given her an eſtate for life in his realty, as well as bequeathed to her his perſonalty; and the Court thought the words "ſaid effects" muſt refer to all the eſtates before given her by the ſame will. The caſe of *Camfield* v. *Gilbert*, 3 *Eaſt*, 516. is a deciſive authority upon the preſent caſe. The teſtator there having given the "real reſidue and remainder of his effects whereſoever and whatſoever, and of what nature, kind, and quality ſoever," the Court of *King's Bench* thought that this reſiduary clauſe muſt be confined to perſonalty. Lord *Ellenborough* there ſaid, "the principal ſtreſs is laid on the word 'effects;' but that word ſtands alone, and nothing is added to alter its uſual ſignification, as in *Hogan* v. *Jackſon*, where the word "real" was added together with it; but in its natural ſignification it means perſonal effects."

Bayley Serjt. for the Defendant. First, *Stephen Andrew* never was poſſeſſed of a ſufficient eſtate in the premiſes to conſtitute him a *ſtipes*. There is no caſe or *dictum* to be found from which

which it can be inferred that the poſſeſſion of any thing leſs than an abſolute fee ſimple will have that effect. Now it is clear that *Stephen Andrew* never took any thing more than a baſe fee. For the inheritance which deſcended upon him at the death of his anceſtor was ſubject to be defeated by the veſting of the executory deviſe to his ſiſter. If he had attained 21, the eſtate which deſcended upon him would have ceaſed, and he would have taken a new eſtate by way of executory deviſe, which would either have been an eſtate for life, and which would have merged in the reverſion, or a new eſtate in fee ſimple. But on the death of *Stephen* the baſe fee ceaſed, and the fee ſimple deſcended to *Deborah* as heir of the deviſor. It is clear from *Co. Lit.* 15. *a.* that the intervention of any eſtate of freehold between the poſſeſſion and the abſolute fee ſimple will prevent the poſſeſſor of the firſt eſtate from becoming a *ſtipes*. For it there appears that, if the father die leaving a widow, and the ſon enter, and take the rents and profits, yet his eſtate in fee ſimple as to one third being defeaſible by the right of dower in the widow, will not deſcend to his ſiſter of the whole blood in preference to his brother of the half blood, though the former will be entitled to the remaining two-thirds. [Lord *Alvanley* Ch. J. If the ſon die before dower be aſſigned to the widow, I rather think that the whole would deſcend to the heir of the ſon; though, if dower be aſſigned during the life of the ſon, the eſtate in dower will interrupt the ſeiſin of the ſon as to one third, and turn it into a reverſion.] Secondly, Under the words of the will an eſtate in fee paſſed to *Deborah Andrew*. The intention of the teſtator to give a fee is evident. It is clear that he meant *Deborah* to take every thing which *Stephen* would have taken if he had lived; and that if *Stephen* attained 21, he meant that he ſhould take every thing and *Deborah* nothing. Now he could not intend to give an eſtate for life only to *Stephen*; for *eo inſtanti* that ſuch an eſtate veſted in *Stephen* it would have merged in the reverſion in fee which deſcended upon him. *Stephen* therefore muſt, at all events, have taken a fee had he attained 21; and as the teſtator appears clearly to have intended to give to *Deborah* all that *Stephen* would have taken, it is hardly to be ſuppoſed that he could mean, in caſe of her death under 21, leaving iſſue, that her children ſhould be excluded. Such then being the apparent intention, the Court will give an effect to the words uſed conformable to that intention, unleſs reſtrained by poſitive rules of law.

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law. The words "all my effects whatsoever not otherwise disposed of in my will," are sufficient for this purpose. These words are at least as strong as the words "testamentary estate," which in *Smith* v. *Coffin*, 2 *H. Bl.* 444. were holden to apply to the realty, though coupled with words peculiarly applicable to personalty. In *Hogan* v. *Jackson*, it is true that the epithet "real" was added to "effects." But Lord *Mansfield* does not appear to have altogether relied upon that circumstance, and he refers to the clauses in the bankrupt laws, where the word "effects" includes every thing which can be turned into money. And the reasons assigned in the House of Lords, when that case was carried there by a writ of error, seem to shew that the judgment of the Court of *King's Bench* did not proceed on the word "real" being used.

On this day the opinion of the Court was delivered by

Lord Alvanley Ch. J. The question intended to be reserved for the opinion of the Court was, Whether, according to the true construction of the will, the testator's daughter *Deborah* would take an estate for life or an estate in fee? On reading the case it occurred to the Court that there was a preliminary point to be decided before that question could arise, *viz*, Whether the fee simple expectant on the estate for life (if it should be so considered) vested in *Stephen Andrew*, as heir of *Isaac Andrew* the son of the testator, or whether the devisee of *Deborah*, his sister of the half blood, be entitled to claim? That point the Court desired to hear argued as well as the other, and it is upon that point only that we shall now give our opinion. The question is, therefore, Whether, supposing an estate for life only to be given to the daughter, the son ever took such an estate that the reversion in fee would descend to his heir at law, or whether it would descend to the heir at law of his father? There is no rule better known in *Westminster Hall* than "that a man that claimeth as heir in fee simple to any man by descent must make himself heir to him that was last seised of the actual freehold and inheritance," *Co. Litt.* 15. *b.*, where Lord *Coke*, in commenting upon the maxim *possessio fratris de feodo simplici facit sororem esse hæredem*, says, "regularly he must make himself heir to him that was last actually seised or to the purchaser." It is necessary that this rule should be accurately understood, for there are some cases in which the ancestor need not be actually seised. If a man purchase a reversion only, he is never actually seised at [illegible] would be entitled. In [illegible], cited in

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the notes to *Hargrave* and *Butler's Co. Litt.* 14. *a.* it is said "if *A.* purchaſes a reverſion expectant on an eſtate for life, and dies without iſſue, regularly his brother of the half blood ſhall not be heir to him, becauſe, though when there is a meſne ſeiſin he ought to make himſelf heir to him who is laſt actually ſeiſed; yet, when there is not ſuch a meſne ſeiſin, he ought to make himſelf heir to him in whom it firſt veſts by purchaſe." After referring to *Hodgkinſonne v. Whood*, *Cro. Car.* 23., where, upon a deviſe to *B.*, the teſtator's ſon by one venter, and the heirs male of his body, remainder to the heirs male of the body of the deviſor, remainder to the deviſor's right heirs, it was holden, upon the death of *B.* without iſſue, that *C.*, the deviſor's ſon by another venter ſhould take as heir male of the deviſor, becauſe it was *quaſi* an eſtate tail; Lord *Hale* ſays, "But it ſeems that the fee ſhall deſcend to him, ſince it is a void deviſe of the fee ſimple, and doth not veſt by purchaſe in the eldeſt ſon, but by deſcent." The ſame doctrine is laid down in *Jenk*'s caſe, *Cro. Car.* 151., where the Plaintiff having declared in debt on bond againſt the Defendant, as brother and heir to *J. S.*, and the Defendant having pleaded *riens per deſcent* from his brother, it appeared that the obligor died ſeiſed, leaving iſſue, and that upon ſuch iſſue dying without iſſue, the lands deſcended to the Defendant as heir to the ſon of his brother, whereupon the Court gave judgment for the Defendant, for he had nothing as immediate heir to his brother, but by deſcent from the ſon of his brother. But in the caſe of *Kellow v. Rowden*, *Carth.* 126. 3 *Mod.* 253., where *A.* being ſeiſed in fee, bound himſelf and his heirs in a bond, and having two ſons *B.* and *C.* limited the eſtate to himſelf for life, remainder to *B.* his eldeſt ſon in tail, reverſion to his own right heirs; *B.* entered and died, leaving a ſon *D.*, who died without iſſue, upon whoſe death the eſtate tail being extinct, the reverſion came into poſſeſſion, and deſcended in fee upon *C.*, it was holden in debt on bond againſt *C.*, as the heir of *A.*, that the declaration was proper, for though *B.* and *D.* had each of them ſuch an intereſt in the fee as that they might have ſold, changed, or forfeited it, yet they had not actual ſeiſin thereof in poſſeſſion, ſo as to be either aſſets in their hands, or to make a *poſſeſſio fratris* to prevent a brother of the half blood from entering, but they were ſeiſed only of the eſtate tail, and the father being the perſon who was laſt ſeiſed of the fee, it was ſufficient to charge the Defendant as heir to him. In that caſe judgment was given for the

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Plaintiff by three judges againſt *Eyre* J.; and they held that it is not the reverſion in fee, but the poſſeſſion, which makes the party inheritable. Both theſe caſes are noticed in my Brother *Williams*'s edition of *Saunders* in the note to *Jeffreſon* v. *Morton*, vol. 2. p. 7. Theſe, and many other caſes which I ſhall forbear to mention, prove, that where there is an intermediate eſtate there is no ſeiſin; though, as I before obſerved, if a man purchaſe a reverſion expectant upon a freehold, it will deſcend to his heir, though it has never come into poſſeſſion. I ſhould not have conſumed ſo much time on this part of the caſe if the doctrine had not been in ſome degree impeached by the caſe of *Smith* v. *Parker*, 2 *Bl.* 1230. In that caſe the Court of Common Pleas held, that where an intermediate tenant for life, with remainder to his firſt and other ſons in tail being in poſſeſſion of his eſtate for life, and having the reverſion in fee in himſelf, ſubject to intermediate eſtates for life, with contingent limitations to the firſt and other ſons of each tenant for life in tail, entered into a bond, and died without iſſue, the reverſion was aſſets in the heir to ſatisfy the bond, when it veſted in him in poſſeſſion. My brother *Williams*, in his note to *Jeffreſon* v. *Morton*, takes notice that the authority of this caſe was queſtioned by Lord *Thurlow* in *The Marchioneſs of Tweedale* v. *The Earl of Coventry*, 1 *Bro Ch. Caſ.* 240., and that the opinion of Lord *Hardwicke*, as far as it is to be collected from the caſe of *Cunningham* v. *Moody*, 1 *Ves.* 174., ſeems alſo to contradict the opinion of the Court of Common Pleas. It is to be obſerved indeed that the caſe was very ſhortly argued, and that it does not appear to have received all that conſideration from the Court which it deſerved. Mr. Serjt. *Adair* merely obſerved, that though the remainder in fee veſted in the obligor, yet being after many intermediate remainders, and three of them eſtates tail, it was too remote to be an actual ſeiſin of the freehold and inheritance. I cannot help thinking, with deference to the very learned Judges by whom the caſe was decided, that if the matter had been more fully diſcuſſed it would have been differently determined. Lord Ch. J. *De Grey* ſeems to have thought that the only difficulty which could have ariſen would have turned upon the queſtion of priority, ſuppoſing all the ſucceſſive tenants for life, having in them the reverſion in fee, to have entered into bonds. This ſerves to ſhew in how great haſte the matter was determined; for if the bond operated as a charge upon the reverſion, it muſt have had the

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ſame effect in reſpect of priority as any other incumbrance by the perſon creating the charge. Mr. Juſtice *Blackſtone*, though he agrees with the reſt of the Court, takes the true diſtinction, for he ſays the obligor might have ſold the reverſion, and might therefore have incumbered it, though, ſtrictly ſpeaking, his bond was no charge upon the reverſion, but only upon the heir in reſpect of ſuch reverſion deſcending. The only queſtion ought to have been, Whether the Defendant took the reverſion as heir of the obligor or not? The Court ſeem to have taken up the caſe in a wrong point of view; and Mr. Juſtice *Nares* almoſt apologiſed for having reſerved the point. Fortified, therefore, by the opinions of Lord *Hardwicke* and Lord *Thurlow*, and after reviewing the ſeveral caſes upon the ſubject, I feel myſelf compelled to deny the authority of that caſe. It appears to me that it cannot be ſupported without impeaching all the deciſions which eſtabliſh that the veſting of a reverſion will not make ſuch a *poſſeſſio fratris* as to convey the eſtate to the heir of the perſon in whom it veſts. In *Cunningham* v. *Moody*, where the limitation was to huſband and wife for their joint lives, remainder to the children of the marriage in tail, and for default of ſuch iſſue, to the right heir of the huſband in fee; the huſband had one daughter of the marriage mentioned in the ſettlement, and another daughter of a ſecond marriage, and upon the death of the firſt daughter without iſſue, the queſtion was, Whether her ſiſter of the half blood was entitled to the reverſion in fee? Lord *Hardwicke* held, that as the reverſion which deſcended upon the eldeſt ſiſter was never clothed with poſſeſſion, it was governed by the rule *poſſeſſio fratris*, &c. and would deſcend to the ſiſter of the half blood; and he relied upon the caſe of *Kellow* v. *Rowden*. In *Lady Tweedale* v. *Lord Coventry*, Lord *Thurlow*, ſpeaking of the caſe of *Smith* v. *Parker*, ſays, that the deciſion in that caſe did not ſo ſatisfy his mind as to have enabled him, had it been neceſſary, to decide the queſtion reſpecting the reverſion without referring to a Court of common law. We now come to the point in this particular caſe. It was urged at the bar, that admitting the doctrine laid down in the caſes to which I have alluded, yet that in the preſent caſe, until the contingency happened, the fee deſcended on the heir at law of the teſtator, ſo that the wife of ſuch heir would have been dowable, or the huſband tenant by the curteſy, according to the caſe of *Buckworth* v. *Thirkell*

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kell (*a*). Admitting the doctrine of that case, if the son of the testator had married his wife would have been endowed. This case is to be found in *Collectanea Juridica*, p. 332. But we have been supplied by my Brother *Lens* with a more accurate note than the

(*a*) The following note was read to the Court by *Lens* Serjt. on the day after the argument.

Buckworth v. *Thirkell*, B. R. Trin. 25 Geo. 3.—This was a case reserved from the *Cambridge* assizes. The form of the action was replevin

Devise to trustees and their heirs to receive the rents and profits of a certain estate, and apply them for the maintenance of *Mary Barnes* till she arrived at the age of 21 years, or till she married; and on her arriving at such age or marrying, to the use of *Mary Barnes*, her heirs and assigns, but in case said *Mary* should die before the age of 21 years, and without leaving issue, remainder over. *Mary* married and had a child, which child died, and then *Mary* died before she arrived at the age of 21 years.

The question was, Whether *Mary*'s husband was entitled to be tenant by the curtesy.

Wood for Plaintiff. In order to make the husband tenant by the curtesy, the wife must be seised of an absolute indefeasible estate in fee simple or fee tail. In *Payne* v. *Sawins*, *Goulds*, 81. and 1 *Leon*. 167, S. C. the distinction is taken between a limitation of an estate, as where an estate tail expires for want of issues, and a condition, which in its creation is to defeat the estate on a certain contingency, and it is held that the first is subject to the tenancy by the curtesy, but otherwise of the second, for, it is said, the condition shall relate to the defeasance of the estate. In *Boothby* v. *Vernon*, 9 *Mod*. 147., the devise was to *Anne* (the heir at law) for life, and if she married and had issue male of her body living at the time of her death, then to such issue male and to his heirs for ever; but if she died leaving no issue male at the time of her death, then to *Gore Boothby* and his heirs for ever. It was held, that the husband of *Anne*, she having married and had issue, could not be tenant by the curtesy, though *Anne* was heir at law, and the fee descended to her in the intermediate time, and it was said by the Court, "Wherever the estate is to be determined by express limitation or condition upon the death of the wife, there the husband shall not be tenant by the curtesy, and a case is put where a contingent estate intervening between her estate for life, and the inheritance, prevents the tenancy by the curtesy.

Whitchurch for Defendant, cited *Lit.* sec. 35 and 52. to shew that where the wife has an estate of inheritance, the husband shall be tenant by the curtesy, and if the estate exists for a moment it shall not be defeated as to this purpose by its subsequent determination. *Co. Lit.* 30. In *Boothby* v. *Vernon*, the heir male of the daughter might be considered as taking by purchase. This is a condition subsequent, and shall not defeat the privilege which has once attached; 3 *Lev.* 132. *Bro. Ab.* title, Tenant by the Curtesy, *pl.* 14. the husband is liable to the services during the life of the wife, and therefore his privilege subsists, though the estate out of which it is derived is destroyed by the death of the wife without issue.

Reply. Tenancy by the curtesy is not properly derived out of the wife's estate, for it may subsist beyond it, where by the expiration of the limitation the wife's estate is gone, but it is a privilege merely. In *Boothby* v. *Vernon* the wife had a fee till the contingency.

Lord *Mansfield*. There is no case expressly in point, let it be spoken to again.

Buller J. Is the remainder-man here heir at law? It was admitted at the bar that he was, and it was agreed to add that fact to the case.

2d Argument.

Le Blanc for Plaintiff. There has been an addition made to the case on a suggestion of the Court, which states that the devisee

the one in print. The case is certainly very like the present. It occasioned some noise in the profession at the time it was decided; and the doctrine there laid down is very fully commented upon in the notes to *Hargrave* and *Butler's Co. Litt.* fol. 241. *a.* The reason-

over, on the death of *Mary Barnes* under 21, without leaving issue, was heir at law of the testator. I am to contend that the estate in this case taken by *Mary* the wife was a defeasible fee simple, and that to introduce a tenancy by the curtesy, there must be a fee simple or fee tail absolute and indefeasible. In *Payne* v. *Samms*, cited in the last argument 1 *Leo.* 167. *Gould*, 81. *Anderson*, 184. the distinction is expresly made in all the reporters, and they all agree, that had the condition been broken, (which was not the case there, because the woman died within the time of performance, and so the estate tail was regugularly spent), there could not have been a tenant by the curtesy. The case of *Bentley* v. *Vernon*, 9 *Mod.* 147. establishes the same doctrine, and several cases are put in the determination. The cases decided on dower, which to this purpose are the same as on the curtesy, though they differ as to the necessity of actual seisin, and in the case of trust, confirm this doctrine. 1 *Rol. Ab.* 676. tit. Dower *F.* and 1 *Vent.* 377. To create tenancy by the curtesy it is not barely sufficient that there shall have been issue capable of inheriting. It is not sufficient in the case of joint tenants. 2 *Ro. Ab.* 90. *Littleton*, in his definition of the curtesy says, the issue must be capable of being seised "of such estate as the wife has." Those words are material, and exclude such an estate as this where there is a condition annexed to the wife's estate only. Tenancy by the curtesy continues in the same manner as before the stat. *de donis*. 2 *Inst.* 333. 8 *Co.* 356. *Bro. Ab.* 296. *Fitz.* 339. *Plowd.* 241. Estates which since the stat. *de donis* have become estates tail were before estates of fee simple conditional. By the birth of issue they became absolute, and that is the reason that as to the curtesy there is no difference between estates in fee and estates tail, for by the circumstance essential to the curtesy, namely the birth of issue, there remained as to this purpose no distinction between them; for in either case it was an absolute fee on which the curtesy attached. But estates created with an expres condition like the present, never became absolute. This estate was always defeasible, and was defeated by the death of the wife under the age of 21 without leaving issue.

Wilson, contrà. Executory limitations and devises were not in use at the time of the stat. *de donis*; they were not intended to alter any of the properties incident to estates and following known principles.

The estate by the curtesy is not necessarily a part of the wife's estate, for it may exist after the wife's estate has expired, but it is taken out of the whole fee simple. In 1. *Ro. Ab.* 676. the Court was equally divided, and the reason given by *Rolle* that dower must be derived out of the husband's estate, is clearly a bad one. There is no case in point on either side. In *Payne* v. *Samms*, the decision went to establish the curtesy. This is a limitation conditional, and not merely a condition, for the defeasance has no relation to the time of creating the estate, as in the case of a condition merely, the breach of which avoids all mesne incumbrances. In the report in *Leonard*, one of the cases put is this, *J. B.* if he does a particular thing is to take the estate from *J. S.* *J. S.* marries, it is there said, if *J. B.* do the particular thing required, yet the wife of *J. S.* shall be endowed. Before the stat. *de donis*, wife tenant in tail has issue and dies, the estate reverts to the donor; yet the husband will be tenant by the curtesy, and the estate does not become an absolute fee by the birth of issue. *Coke* puts a case of the wife having issue and being attainted afterwards, yet the husband is tenant by the curtesy.

Reply. Curtesy is derived out of the wife's estate, because by the birth of issue her estate becomes absolute, and it does not

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ing in that note is the reasoning of the learned editors entirely, and as such I cite it. It is there stated, as the result of various authorities, that with respect to limited fees, where the fee in its original creation is only to continue to a certain period, the wife is to hold her dower and the husband his curtesy after the expiration of the period to which the fee charged with the dower or curtesy is to continue; but that where the fee is originally devised in words importing a fee simple, or fee tail absolute or unconditional, but by subsequent words is made determinable upon some particular event, there, if that particular event happens, the wife's dower and the husband's curtesy cease with the estate to which it is annexed. It is not necessary for me to enter into an examination of the several cases referred to in this note. The observations there made are certainly worthy of attention; but we do not feel ourselves

properly subsist after the extinction of the wife's estate. This estate was conditional, and never turned into a fee simple. The case put by *Leon.* cannot be law, for if it were, the wife of every mortgagee would be entitled to dower in the mortgage estate.

Lord *Mansfield.* Tenancy by the curtesy existed before the stat. *de donis*, and the definition of it is, that the wife must be seised of an estate of inheritance, which by possibility her issue by the husband may inherit, and there must be issue born. Estates at that time were of two sorts, conditional or absolute, and curtesy applied to both equally. I cannot agree with the argument, that on performance of the condition by birth of a child the estate became absolute; it was so by a subtilty in odium of perpetuity, and for the special purpose of alienation but for no other. It otherwise reverted to the donor on failure of the issue according to the original restriction. At common law the only modification of estates was by condition. The statute of uses introduced a greater latitude of qualification, but there arose a great dread of letting in perpetuities by means of the extensive operation of that statute, and in the time of *Eliz.* and *James*, many cases were decided with a view to prevent that effect; with this view it was allowed to bar contingent remainders before the person who was to take came into *esse*; others were held to be too remote in their creation. The cases proceeded in that view too far, and estates were too much loosened, and it became necessary to restrain them again; and in the time of the troubles, eminent lawyers who were then chamber counsel, devised methods which on their return to *Westminster Hall* they put in practice, such as interposing trustees to preserve contingent remainders. It is not of long date that the rules now in use have been established. I remember the introduction of the rule which prescribes the time in which executory devises must take effect to be a life or lives in being, and 21 years afterwards. It is contended that this is a conditional limitation. It is not so, but a contingent limitation, all the cases cited go upon the distinction of their being conditions and not limitations. During the life of the wife she continued seised of a fee simple to which her issue might by possibility inherit. I am of opinion, that the Defendant is entitled to be tenant by the curtesy.

The rest of the Court assenting, Judgment for the Defendant.

here

here bound to enter into the queſtions reſpecting curteſy and dower, or to give any opinion upon the caſe decided in the *King's Bench*, from which we are all of opinion that the preſent caſe is very diſtinguiſhable. Here the leſſor of the Plaintiff claims as heir to the ſon of the teſtator; but of what eſtate does he claim to be heir? Does he claim to be heir of a fee ſimple abſolute? His title accrued at the time of the death of his anceſtor, that is the ſon of the teſtator. No fee ſimple abſolute deſcended upon him as ſuch heir, but merely a reverſion expectant on an eſtate for life. Now where was the ſeiſin of the ſon? It is ſaid that he had once a fee in him, and if ſo, why did it not deſcend to his heir? But it muſt be admitted that the ſon did not die actually ſeiſed of a fee ſimple abſolute, but only of a reverſion expectant on an eſtate for life. As to the caſe of dower, I admit that the whole eſtate deſcends upon the ſon till aſſignment of dower; but when dower is aſſigned, the fee at the death of the wife ſhall deſcend to the heir of the father, and not to the heir of the ſon, for the moment that dower is aſſigned it is the ſame as if the wife had taken a life eſtate at the death of her huſband, and the ſon becomes only entitled to a reverſion in that third part, which will not deſcend to his ſiſter of the whole blood in preference to his brother of the half blood, for though he once had poſſeſſion of the whole fee ſimple, his actual ſeiſin was defeated by the aſſignment of dower. This appears from *Co. Litt.* 15. *a.*; and in *Co. Litt.* 31. *a.*, it is ſaid, that if there be grand-father, father, and ſon, and the grand-father be ſeiſed of three acres in fee, and taketh wife and dieth, and the land deſcendeth to the father and the father dieth, and the wife of the grand-father is endowed of one acre and dieth, the wife of the father ſhall be endowed only of the two acres reſidue; for the dower of the grand-mother is paramount the title of the wife of the father, and the ſeiſin of the father which deſcended to him (be it in law or actual) is defeated, and the father had but a reverſion expectant on a freehold. The reſult of this caſe I take to be, that the father was ſeiſed in fee ſubject to the dower of the grand-mother, and was in the ſame ſituation as the ſon of the teſtator in this caſe until the contingency happened; and it appears to me deciſive of the preſent caſe. The caſe of *Goodright* v. *Searle*, 2 *Wilſ.* 29. alſo appears to me to be in point. In that caſe *George Paynter* deviſed to his ſon in fee, but if he happened to die before 21, leaving no iſſue, to the teſtator's mother *Catherine Paynter* in fee. The teſtator died

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died in 1750, leaving *George* his only ſon; *Catherine* died 5th *Jan.* in 1754. *George*, the ſon of the teſtator, who was alſo grandſon and heir of *Catherine*, died 6th *Jan.* 1754, before 21, and without iſſue. The leſſor of the Plaintiff was couſin and heir to *George* the ſon; the wife of the Defendant was ſiſter and heir of *Catherine*, and couſin and heir of *George* on the part of *Catherine*. The queſtion was, Of what eſtate *George* the ſon died ſeiſed; whether of the baſe fee which deſcended to him from his father, or of the poſſibility which deſcended to him from his grandmother? If of the former, his heir *ex parte paterna* would be entitled; if of the latter, his heir on the part of his grand-mother. It was contended, that upon the death of the teſtator the fee deſcended upon the ſon, notwithſtanding the conditional deviſe to him; that upon the death of *Catherine* her intereſt alſo deſcended upon him, and merged in his greater eſtate which he had by deſcent from his father, and that therefore his heir *ex parte paterna* was entitled. After the firſt argument, Lord Ch. J. *Willes*, Mr. Juſtice *Clive*, and Mr. Juſtice *Birch* intimated their opinions that the fee ſimple did not deſcend to the ſon upon the death of the teſtator, but was only deviſed to him upon condition; and that as the condition upon which he was to take never happened, the heir of *Catherine*, to whom it was deviſed over in fee, was entitled, according to the rule adopted in *Goodright* d. *Gurnall* v. *Wood*, *Willes*, 211., that the heir of an executory deviſee in fee ſhall take though the deviſee die before the contingency happen. Mr. Juſtice *Bathurſt*, however entertaining ſome doubts, the caſe was argued again, and after the ſecond argument it appears that the Court were all agreed, and the Chief Juſtice was ready to deliver their opinion in favour of the Defendant, though he deferred it in order to give an opportunity to compromiſe the matter. If, therefore, we are to conſider the expreſſion of the Judges after the firſt argument as the opinion of the Court, the caſe is an expreſs authority in point; for there, although the eſtate in fee deſcended upon the ſon until the contingency, it was holden not to be that ſort of fee which would deſcend to his heir *ex parte paterna*. The comment of Mr. *Fearne*, in his Treatiſe on Contingent Remainders and Executory Deviſes, vol. 2. p. 449., appears to me to be very well warranted, and we cannot better expreſs our reaſon why in the preſent caſe the eſtate deſcended to the ſiſter of the half blood, and not to the uncle of the

whole

whole blood, than by adopting his expreſſion. "This," he ſays, "is agreeable to that rule of deſcent which requires that a perſon who claims a fee ſimple by deſcent from one who was the firſt purchaſer of the reverſion or remainder expectant on a freehold eſtate, muſt make himſelf heir to ſuch purchaſer at the time when that reverſion or remainder falls into poſſeſſion. So here the intereſt of *Catherine Paynter* was future, ſhe had no ſeiſin of the freehold; and therefore the perſon claiming by deſcent from her, muſt, by analogy to the above rule be heir at law to her when the eſtate fell into poſſeſſion. And as to the queſtion ſtarted in that caſe, Whether this executory intereſt did not, by the deſcent of it from *Catherine Paynter* at her deceaſe upon *George*, who was then her heir at law, become merged in the fee which he took by deſcent from his father (the teſtator), it vaniſhes when we conſider that the executory fee deviſed to the mother could have no exiſtence before the deceaſe of the ſon under age without iſſue; for upon that event only could it ariſe. Now how was it poſſible for it to merge before it had any exiſtence? If it could be extinguiſhed by merger it muſt be by its union with a greater eſtate, out of which it was to ariſe, and of which it might be conſidered as part, or at leaſt as an extraction. But how are two eſtates to unite, or one to become blended, or confounded with, or abſorbed in the other, when both are of equal meaſure, *viz.* both fee ſimples; and of which the one cannot commence or partake of exiſtence at all, but in an event which deſtroys and annihilates the other?" The rule is alſo well ſtated in *Watkins's Law of Deſcents*, chap. 3. ſ. 2. He firſt obſerves that, "when a reverſion, or remainder expectant upon an eſtate of freehold continues in a courſe of deſcent, it continually devolves on the death of each particular heir to the perſon who can *then* make himſelf heir to the donor or purchaſer, without any regard to the very heir of the precedent perſon who ſucceeded to it by deſcent; till when the particular eſtate is determined it ultimately veſts in poſſeſſion in him who at ſuch determination is the right heir of ſuch donor, purchaſer, or original remainder-man. For as there was no intermediate perſon actually ſeiſed of ſuch reverſion or remainder, no one could be the mean of turning its deſcent and becoming a new ſtock or *terminus*; but ſuch ſtock muſt yet be in the donor, purchaſer, or remainderman, and muſt ſo continue, if no alienation be made, till ſuch eſtate

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shall become vested in possession." He afterwards adds, "So also with respect to contingencies and executory devises. Thus on a devise to *G.* in fee; but if he happened to die under the age of 21 years, leaving no issue, then to *P.* in fee; after the decease of the testator *P.* died in the lifetime of *G.*, who afterwards died under the age of 21, and without issue; it was held, that the lands vested in *P*'s. heir at law, upon the happening of the contingency, (*viz.* on the death of *G.* under age, and without issue,) but that the interest, while it was contingent, did not so attach in *G.* who was heir at law to *P.* on her decease as to carry it on his death to his heir at law, who was not heir at law to *P.*, but that it vested in that person who was heir at law to *P.* (the first purchaser) at the time of the first contingency happening." On the whole, we think that it appears clearly, notwithstanding the case of *Buckworth* v. *Thirkell*, that *Stephen Andrew* did not die seized of such an estate in fee as would descend upon his heir of the whole blood, but only of an estate expectant upon the life estate of his sister. This being the case, it is not necessary for us to give an opinion upon the second point.

Judgment for the Defendant.

Lord Alvanley Ch. J. afterwards noticed a mistake in the report of *Jenkins* d. *Harris* v. *Pritchard*, 2 *Wils.* 45., which case is there said to have been determined in favour of the Defendants, whereas all the reasoning shews that it must have been determined in favour of the lessors of the Plaintiffs.

[Mr. Justice *Chambre* was absent during the whole of this term from indisposition.]

END OF HILARY TERM.

AN

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3. If one of the deeds to lead the uſes of a fine, *viz.* the leaſe, contain the word "tithes," but the other deed, *viz.* the releaſe, omit that word, the Court will not amend the writ of entry by inſerting the word "tithes," though the releaſe has the words, "and alſo all houſes, ways, &c. hereditaments and appurtenances whatſoever, to the ſaid meſſuages, lands, &c. belonging, or in any way appertaining." *Phillips* v. *Jones*, *E.* 43 *Geo.* 3. 362

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1. If proceedings be commenced upon a recognizance of bail immediately upon the return of the *ca. ſa.*, the Court will not ſtay them but upon payment of the coſts, though the principal be ſurrendered within the four days allowed by the practice of the Court. *Abbott* v. *Rawley*, *H.* 42 *Geo.* 3. *Page* 13

2. If a bail above be put in and juſtified within four days from the ruling the ſheriff to bring in the body, the Court will ſet aſide all proceedings upon the bail-bond commenced previous to the time of juſtification. *Wright* v. *Walker*, *M.* 44 *Geo.* 3. 564

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2. *Semb.* That perſons ſuing as adminiſtrators need not in any caſe negative ſuch tender to their inteſtate. *ib.*

3. In an action by the aſſignees of a bankrupt, it is not ſufficient for the bankrupt to negative a tender in bank notes in the affidavit to hold to bail. *Smith* v. *Barclay*, *M.* 43 *Geo.* 3. 219

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2. Property in which a bankrupt has only a truſt eſtate, does not paſs to his aſſignees under the aſſignment. Therefore the *ceſtuy que truſt* cannot bring any action reſpecting ſuch property in their names, but ought to bring it in the name of the bankrupt. *Carpenter* v. *Mornell*, *H.* 42 *Geo.* 3. *Page* 40

3. A commiſſion of bankrupt founded on the petition of *A.* a *Britiſh* ſubject reſident in *England* for a debt due to himſelf and his partners *B.* and *C.*, alſo *Britiſh* ſubjects, but reſident and carrying on trade in an enemy's country, cannot be ſupported. *M'Connell* v. *Hector*, *E.* 42 *Geo.* 3. 113

4. A trader, ſubſequent to an act of bankruptcy, being arreſted and detained in priſon at the ſuit of ſeveral creditors, ſent for all his creditors but one, and paid their debts in full; but no other circumſtance occurred from which it could be preſumed that they knew of his bankruptcy or inſolvency. Held that ſuch payments were not protected by the 19 *Geo.* 2. *c.* 32. *Southey* v. *Butler*, *M.* 43 *Geo.* 3. 237

5. *A.* and *B.* being partners in trade, *A.* committed an act of bankruptcy, a few days after which *B.* alſo committed an act of bankruptcy, and between the two acts of bankruptcy a clerk of the houſe paid to *C.* a creditor of the houſe at his requeſt 558*l.* and after both acts of bankruptcy 5*l.* more. The aſſignees, under a joint commiſſion againſt *A.* and *B.*, brought an action againſt *C.* to recover theſe ſums of money, and declared firſt, for money had and received to the uſe of *A.* and *B.* before they became bankrupts; ſecondly, for money had and received to their own uſe as aſſignees of *A.* and *B.* after the bankruptcy of *A.* and *B.*; and third, upon an account ſtated with them as ſuch aſſignees. Held that under this declaration the aſſignees were only entitled to recover the 5*l.* paid after the bankruptcy of both partners. *Smith* v. *Goddard*, *T.* 43 *Geo.* 3. 465

6. *Semb.* That if they had declared for money had and received to their uſe, as aſſignees

of *A.*, they might have recovered one moiety of the 558*l.* paid between the two acts of bankruptcy. *Page* 465

7. If the aſſignees of an uncertificated bankrupt in their own names execute a deed with other creditors, whereby they, and all the creditors who may ſign the ſaid deed, releaſe the bankrupt from all actions, ſuits, claims, and demands againſt him or his eſtate, and ſuch deed be not ſigned by all the creditors of the bankrupt, the aſſignees are not barred from claiming as aſſignees the benefit of a patent-right afterwards obtained by the bankrupt. *Heſſe* v. *Stevenſon*, *M.* 44 *Geo.* 3. 565

8. A patent-right for the excluſive exerciſe of an invention obtained from the Crown by an uncertificated bankrupt, is affected by the previous aſſignment of the commiſſioners, and veſts in the aſſignees. *ib.*

9. An act of parliament empowering ſuch bankrupt patentee, his executors, adminiſtrators, and aſſigns, to aſſign the right to a greater number of perſons than allowed by the letters patent, and declared to be a public act, does not enable either the bankrupt or his aſſigns to make a better title than they could before the act. *ib.*

BARON AND FEME.

1. The Court refuſed to ſet aſide, upon ſummary application, a judgment entered upon a warrant of attorney by a feme covert. *Maclean* v. *Douglas*, *E.* 42 *Geo.* 3. 128

2. If a feme covert be taken in execution under a warrant of attorney given by her as a feme ſole, the Court will not diſcharge her on a ſummary application. *Wilkins* v. *Wetherill* and *Coutts*, *M.* 43 *Geo.* 3. 220

BENEFICE.

See INSOLVENT, 1.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See PLEADING, 7.
STAMPS 1.
VARIANCE, 1.

1. If a bill of exchange be made payable two months after date, and no date be expreſſed, the Court will intend it to be payable two months after the day on which it was made. *Hogue* v. *French*, *T.* 42. *Geo.* 3. *Page* 173

2. *A.* depoſited a ſum of money at the banking houſe of *B.* in *Paris*, for which *B.* gave him his note "payable in *Paris* or at the choice of the bearer at the Union Bank in *Dover*, or at my uſual reſidence in *London* according to the courſe of exchange upon *Paris*;" after this note was given, the direct courſe of exchange between *London* and *Paris* ceaſed altogether, having been, previous to its total ceſſation, extremely low; the note was at a ſubſequent period preſented for acceptance and payment at the reſidence of *B.* in *London*, at which time there was a circuitous courſe of exchange upon *Paris* by way of *Hamburgh*. Held that *A.* was entitled to recover upon the note according to ſuch circuitous courſe of exchange upon *Paris* at the time when the note was preſented. *Pollard* v. *Sir Robert Herries*, *H.* 43 *Geo* 3. 335

3. If the holder of a bill of exchange, of which payment has been refuſed, inform the drawer of his intention to take ſecurity from the acceptor, and the drawer anſwer, that he may do as he likes, for that he (the drawer) is diſcharged for want of notice, and it appear that due notice has been given; the holder may ſue the drawer, notwithſtanding that he has taken ſecurity from the acceptor; for the drawer under ſuch circumſtances muſt be conſidered as having aſſented to the ſecurity being taken. *Clark* v. *Devlin*, *E.* 43 *Geo.* 3. 363

4. A bill indorſed in blank, and depoſited by the holder with his bankers, became due on *Saturday*, and was preſented for payment about two o'clock on that day. Payment being refuſed, the bill was noted and again preſented between 9 and 10 in the evening by a notary. On *Monday* the bankers informed the holder that the bill was diſhonoured, who on *Monday* about noon gave notice to the indorſer. The holder lived at *Knightſbridge*, and the indorſer in *Tottenham-Court-Road*. Held that this notice was ſufficient to entitle the holder to recover againſt the indorſer. *Haynes* v. *Birks*, *H.* 44 *Geo.* 3. 599

INDEX TO THE PRINCIPAL MATTERS.

BOND.

See PLEADING, 13.
RESIGNATION BOND, 1.

BRIDGES.

See CERTIORARI.

Quære, Whether the ſame perſons who are bound to repair a bridge are alſo bound to widen it, if the exigencies of the public ſhould require? *The Inhabitants of the County of Cumberland* v. *The King* in Error, *E.* 43 *Geo.* 3. *Page* 354

BY-LAWS.

A penalty of 20*s.* having been impoſed by one of the by-laws of the Butchers' Company on all perſons ſelling meat on a *Sunday* within their juriſdiction, it was declared by a ſubſequent clauſe, that if any offender ſhould deny, refuſe, or neglect to pay the penalty, he ſhould be liable to an action of debt. Held, that it was not neceſſary to prove a previous demand in order to maintain ſuch action, although averred in the declaration. *The Butchers' Company* v. *Bullock*, *E.* 43 *Geo.* 3. 434

C

CARRIER.

See STOPPAGE IN TRANSITU, 1, 2.
VENDOR AND VENDEE, 1.

CERTIFICATE.

See ATTORNEY.

CERTIORARI.

The 1 *Anne*, *c.* 18. *ſ.* 5. has not taken away from the Crown the power of removing by *certiorari* an indictment for not repairing a county bridge *The Inhabitants of the County of Cumberland* v. *The King* in Error, *E.* 43 *Geo.* 3. 354

CHARTERPARTY.

See CONTRACT, 1, 2.

COLLEGES.

See LAND TAX.

COMMON INFORMER.

See ATTORNEY.

COMMON RECOVERY.

If the different vouchees in a recovery execute and acknowledge ſeveral warrants of attorney, though upon the ſame piece of parchment, the Court will not ſuffer the recovery to paſs. *Jennings* v. *Street*, *E.* 43 *Geo.* 3. *Page* 361

CONSIGNOR AND CONSIGNEE.

See LIEN, 1, 2.
STOPPAGE IN TRANSITU.
VENDOR AND VENDEE, 1.

CONTRACT.

See AGREEMENT.
MONEY HAD AND RECEIVED, 2.
PAYING MONEY INTO COURT, 1.
SEAMAN'S WAGES, 4.

1. If a *Britiſh* merchant charter a *Swediſh* ſhip on a voyage to *St. Michael's* for a cargo of fruit, and the charterparty contain the uſual exception againſt the reſtraint of princes, and the ſhip be prevented from reaching *St. Michael's* within the fruit ſeaſon by an embargo laid on *Swediſh* veſſels by the *Britiſh* government, the *Swediſh* owner cannot, by proceeding on the voyage after the embargo is taken off, entitle himſelf to recover the freight againſt the *Britiſh* merchant. *Touteng* v. *Hubbard*, *M.* 43 *Geo.* 3. 291

2. If *A.* contract with *B.* to fetch a cargo of corn from *C.* and on his arrival there find that the government has prohibited the exportation of corn, and therefore, after ſtaying out his demurrage days return in ballaſt, *B.* is notwithſtanding liable to pay freight; but not demurrage, if he knows of the prohibition before he entered the port of *C.*, though allowed demurrage by the contract. *Blight* v. *Page*. Sittings after *Mich. T.* 1801, *Cor.* Lord *Kenyon*, 295. *n.*

COPYHOLD.

1. If there be a cuſtom within a manor for a lord to grant parcels of the waſte by copy of court roll, the premiſes granted in the above mode are well deſcribed as copyhold premiſes, though the date of the grant be modern. *Lord Northwick* v. *Stanway*, *H.* 43 *Geo.* 3. 346

2. If

2. If an aſſeſſment of a copyhold fine be entered in the court rolls as of 100*l.* but that out of eſpecial favour the lord remitted 40*l.* and thereby reduced it to 60*l.*, and the lord ſue for the fine, and the jury finding the annual value of the premiſes 30*l.*, give a verdict for 60*l.*, the lord cannot retain the verdict for the ſum actually due, but muſt make a new aſſeſſment, the old aſſeſſment, notwithſtanding the remitter, being in law an aſſeſſment as of 100*l.* *Page* 346

COSTS.

See BAIL, 1.

PAYING MONEY INTO COURT, 3.

PRACTICE, 13. 20.

1. Ejectment in *C. B.* and verdict for the Plaintiff, and coſts paid by the Defendant, who then brought an ejectment in *K. B.* for the ſame premiſes and recovered, but was not paid his coſts; and now a third ejectment being commenced here by the Plaintiff in the firſt ejectment, the Court ſtayed proceedings until payment of the coſts of the ſecond ejectment in *K. B.* *Doe* d. *Walker* v. *Stevenſon*, *H.* 42 *Geo.* 3. 22

2. Plaintiff ſued as adminiſtrator upon a contract made with his inteſtate, and aſſigned by the Plaintiff to *J. S.* for whoſe benefit the action was brought. It appearing that the contract had been annulled with the privity both of the Plaintiff and *J. S.*, and that the former was indemnified by the latter, and a verdict being found for the Defendant, the Court made an order of the Plaintiff to pay the coſts. *Comber* v. *Hardcaſtle*, *E.* 42 *Geo.* 3. 115.

3. If a rule of Court for the examination of witneſſes by commiſſion expreſs that the depoſition of witneſſes at *Hamburgh* and *Lubeck* are to be taken, and the commiſſion is directed to perſons at *Hamburgh*, the expences of bringing witneſſes from *Lubeck* to *Hamburgh* ought to be allowed upon taxation. *Muller* v. *Hartſhorne*, *M.* 44 *Geo.* 3 556

4. Time for putting in bail expired on the 30th, Defendant on the 31ſt moved to juſtify, purſuant to a notice previouſly given. Held that the Plaintiff was entitled to the coſts of preparing to move for an attachment. *Jarrett* v. *Creaſy*, *H.* 44 *Geo.* 3. 603

COVENANT.

See SLAVE, 1.

Covenant by the aſſignor of certain ſhares in a patent right that he has good right, full power, and lawful authority to aſſign and convey the ſaid ſhares, and that he has not by any means, directly or indirectly, forfeited any right or authority he ever had over the ſame. Held that the generality of the former words of the covenant was not reſtrained by the latter. *Heſſ* v. *Stevenſon*. *M.* 44 *Geo.* 3. *Page* 565

COUNTY COURT.

See VENDOR AND VENDEE, 2.

CURTESY,

An eſtate was deviſed to truſtees and their heirs till *A.*, a female infant, ſhould attain 21 or marry; and upon her attaining 21 or marrying, to *A.* and her heirs; and in caſe ſhe ſhould die under 21 without leaving iſſue, remainder over. *A.* married and had a child, which child died, and then *A.* died under 21. Held that her huſband was entitled to be tenant by the curteſy. *Buckworth* v. *Thirkell*, *T.* 25 *Geo.* 3. 652 *n.*

CUSTOMARY TENEMENTS.

See PARTITION, 1.

D.

DAMAGES,

See PENALTY.

DECEIT.

In an action on the caſe for giving a falſe character to a tradeſman, whereby he was induced to truſt an inſolvent perſon, the Court held that fraud was neceſſary to ſupport the action, but ſet aſide a verdict for the Plaintiff on payment of coſts, though there were ſome circumſtances in the caſe from which fraud might be inferred, on a ſuſpicion that the inquiry was made of the Defendant with a view to entrap him, and thereby obtain his guarantee for payment of the debt contracted by the inſolvent. *Tapp* v. *Lee*, *E.* 43 *Geo.* 3. 367

DEFAMATION.

See SLANDER.

DEFEAZANCE.

See PRACTICE, 19.

DEMURRAGE.

See CONTRACT, 2.

DEPOSIT.

See MONEY HAD AND RECEIVED, 2.

DESCENT.

See CURTESY.

J. A. devised all his lands to *S. A.* (his son by the first venter) when he should come to the age of 21 years, but if he should die before 21 years, and *D. A.* (the testator's daughter by the second venter) should be then living, he gave the same to her when she should attain 21 years. Testator died, and then *S. A.* died under age and without issue. Held, that on the death of *S. A.* the inheritance vested in *D. A.* his sister of the half blood in preference to his uncle of the whole blood. *Doe* d. *Andrew* v. *Hutton*, H. 44 *Geo.* 3. *Page* 643

DESERTION.

See SEAMAN'S WAGES, 1, 2.

DEVISE.

See CURTESY.

DESCENT, 1.

1. If a testator having executed a devise of lands in the presence of three witnesses to two persons as joint tenants in fee, afterwards strike out the name of one of the devisees and there be no republication, the erasure will only operate as a revocation of the will *pro tanto*. *Larkins* v. *Larkins*, H. 42 *Geo.* 3. 16. 109.

2. *A.* devised thus: "As to my real and personal estate, subject to my debts and funeral expences, I give and devise as follows, *viz.* my real estate and all my personal estate unto *J. M.* and *O. W.* and their heirs on the following trusts, *viz.* to the intent that they dispose of my personal estate in discharge of my debts, funeral expences, and such legacies as I may direct, and as to my real estates, subject to my debts, and such charges as I may make, I give and devise the same to *R. P.* for life. Held that under this devise the legal estate in the realty vested in *R. P.* for his life, and *J. M.* and *O. W.* took no estate therein. *Kenrick* v. *Lord W. Beauclerck*, T. 42 *Geo.* 3. *Page* 175

3. *A.* devised to his wife his house and goods, with all his lands, goods and chattels whatsoever and wheresoever, for her life; and after her death to two younger sons till they should attain the age of 15, for their education. He then devised his aforesaid house, goods, and chattels, equally to be divided between all his sons and daughters, share and share alike. Held that under the last clause of the devise the lands did not pass. *Roe* d. *Walker* v. *Walker*, E. 43 *Geo.* 3. 375

4. Devise to testator's first son by his wife gotten or to be gotten, for life, remainder to trustees to preserve contingent remainders; remainder to the several heirs male of such first son lawfully issuing, so as the elder of such sons and the heirs male of his body should always be preferred and take before the younger and the heirs male of his body; remainder to the testator's second, third, fourth, and all and every other son and sons, for their several and respective lives; remainder to trustees, and to preserve, &c.; remainder to the several heirs male of their several and respective bodies lawfully issuing, so as the elder of such sons, and the heirs male of his body, should be always preferred and take before the younger of the same sons, and the heirs male of his and their body and bodies; remainder to the testator's first and other daughters for their lives; remainder to trustees, &c.; remainder to the several heirs of their several and respective bodies lawfully issuing, so as the elder of such daughters, and the heirs male of her body, should always be preferred and take before the younger of the same daughters, and the heirs male of her and their body and bodies. There were other clauses in the will, by which, after giving an estate for life to the first taker, the testator limited to trustees, &c.; remainder to the first and other sons of such first taker, and the heirs of

of their bodies, ſo as the elder of ſuch ſons, and the heirs of their bodies ſhould always be preferred before the younger of the ſame ſons and the heirs male of their bodies. Held that the firſt ſon of the teſtator took an eſtate tail. *Poole* v. *Poole*, *H.* 44 *Geo.* 3. *Page* 620

DISTRINGAS.

See PARTNERS, 1.

E

EAST INDIA COMPANY.

See INSURANCE, 2.

1. The ſales of the *Eaſt India* Company being ſubject to a regulation that any buyer not making good the remainder of his purchaſe money on or before the day limited for ſuch payment ſhould forfeit the depoſit, "and ſhould be rendered incapable of buying again at any future ſale until he ſhould have given ſatisfaction to the Court of Directors;" held that the term ſatisfaction muſt be conſidered to mean pecuniary compenſation for the non-performance of his agreement to pay on the appointed day, and that a buyer having made default on the day, but afterwards, within a future time given to him by the *Eaſt India* Company, paid the remainder of the purchaſe money with intereſt, might maintain an action againſt the *Eaſt India* Company for refuſing to allow him to become a bidder at their ſales, ſuch ſales being by 9 & 10 *W.* 3. *c.* 44. *ſ.* 69. declared to be public and open ſales. *Eagleton* v. *Eaſt India Company*, *H.* 42 *Geo.* 3. 55

2. *Quære*, Whether ſince the paſſing of 18 *Geo.* 3. *c.* 26. which regulates the depoſits, forfeitures, and incapacities of bidders at the tea ſales of the *Eaſt India* Company, the *Eaſt India* Company can make or enforce any other regulations affecting thoſe ſales than ſuch as the act of parliament has enacted. *ib.*

EMBARGO.

See CONTRACT, 1, 2.
INSURANCE, 11.
SEAMAN'S WAGES, 4.

EMBEZZLEMENT.

See INDICTMENT, 1, 2.

EVIDENCE.

See AGREEMENT, 2.
BYE-LAWS, 1.
INSURANCE, 13, 14.
PAYING MONEY INTO COURT, 2.
PLEADING, 4.
VARIANCE 1.

1. In trover for the certificate of a ſhip's regiſtry, the certificate may be proved by the production of the regiſtry from which it was copied, though no notice has been given to produce the certificate itſelf. *Bucher* v. *Jarratt*, *E.* 42 *Geo.* 3. *Page* 143

2. The priſon books of the *Fleet* and *King's Bench* priſons, though admiſſible evidence to prove the period of the commitment and diſcharge of a priſoner, are not admiſſible to prove the cauſe of his commitment. *Sale* v. *Thomas*, *T.* 42 *Geo.* 3. 188

3. In an action for an eſcape out of execution the declaration alleged that the priſoner was, by *habeas corpus*, brought before a judge of *K. B.* and by him committed to the cuſtody of the marſhal, "as by the ſaid writ of *habeas corpus*, and the ſaid commitment thereon now remaining in the ſaid Court more fully appears." Held that evidence of a commitment by a judge of *K. B.* but not filed of record, would not ſupport the action. *Turner* v. *Eyles*, *T.* 43 *Geo.* 3. 456

4. Held alſo that the above allegation (even if neceſſary) muſt be proved as laid *ib.*

EVICTION,

See MONEY HAD AND RECEIVED, 1.

ESCAPE,

See EVIDENCE, 3, 4.

EXCHANGE,

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

EXECUTORS AND ADMINISTRATORS,

See BANK ACT, 1, 2.
COSTS, 2.
PLEADING, 1.

The

The authority of an administrator appointed according to the provisions of 38 *Geo.* 3. *c.* 87. during the absence of an executor from this country, does not become actually void upon the death of such executor, but only voidable. *Taynton* v. *Hannay*, *H.* 42 *Geo.* 3. *Page* 26

EXECUTION,

See PARTNERS, 2, 3.
TRESPASS, 1, 2.

Where the Defendant suffers judgment by default in an action of debt on simple contract, the Plaintiff is not entitled to levy the expences of the execution; notwithstanding those expences, together with the debt and costs of the action, do not exceed the sum confessed upon record. *Thornton* v. *Merredew*, *E.* 43 *Geo.* 3. 362

F.

FACTOR,

See LIEN, 3.

FALSE CHARACTER,

See DECEIT.
SLANDER, 2.

FELONY,

See INDICTMENT, 1, 2.
POST-OFFICE, 1, 2.

FEME COVERT,

See BARON AND FEME.

FINE,

See AMENDMENT, 3.

If under a *dedimus potestatem* to take the acknowledgment of nine persons to a fine, the commissioners take the acknowledgment of six on one piece of parchment, and of three on another, the Court will not allow the fine to pass. *Balch* v. *Phelps*, *E* 43 *Geo.* 3. 366

FINES,

See COPYHOLD, 2.

FRAUD,

See DECEIT, 1.

FRAUDS, STATUTE OF,

See STATUTE OF FRAUDS.

FREIGHT,

See CONTRACT, 1, 2.
INSURANCE, 11.

GOODS SOLD AND DELIVERED,

See VENDOR AND VENDEE, 2.

1. If goods be bought to be paid for by a bill at two months, and the vendor accordingly draw upon the vendee for the value, who refuses to accept, *semb.* that the vendee cannot be sued in an action for goods sold and delivered, but upon the special contract only. *Dutton* v. *Solomonson*, *M.* 44 *Geo.* 3. *Page* 582

2. But certainly he cannot be sued in that form of action till after the expiration of the two months, *ib.*

GRANT,

See COPYHOLD, 1.

H.

HABEAS CORPUS,

See EVIDENCE, 3.
LUNATIC, 1.

I.

ILLEGAL TRADE.

See BANKRUPT, 3.
INSURANCE, 1, 2. 15.
LICENCE, 1.

INDICTMENT,

See CERTIORARI, 1.

1. In an indictment on the 39 *Geo.* 3. *c.* 85. against a servant for embezzling money received on his master's account, it is not sufficient to follow the words of the statute, but there must be a positive allegation that the money was the property of the master as in the case of larceny. *The King* v. *M'Gregor*, *H.* 42 *Geo.* 3. 106

2. If a servant receive money for his master in the county of *A.*, and being called upon to account

account for it in the county of *B*, there deny the receipt of it, he may be indicted for the embezzlement in the latter county. *Rex* v. *Taylor*, *Old Bailey* Sessions after *M.* 44 *Geo.* 3. *Page* 596

INSOLVENT,

See JUDGMENT, 1.
LORD'S ACT.

1. The profits of an ecclesiastical benefice do not pass to the assignees under an insolvent act, though included in the schedule of the insolvent. *Arbuckle* v. *Cowtan*, *H.* 43 *Geo.* 3. 321
2. An insolvent discharged under the 43 *Geo.* 3. c. 70. cannot be holden to bail on a bill drawn and indorsed over by him previous to the 1st of *March* 1803, though not due till after that period. *Sharpe* v. *Iffgrave*, *E.* 43 *Geo.* 3. 394

INSURANCE,

See LICENCE, 1.
PAYING MONEY INTO COURT, 2.
PLEADING, 4.

1. Insurance on goods on board a *Spanish* ship from *Nassau* to *Campeachy* to continue on the goods till discharged and safely landed. The ship having a licence from the *British* Governor at *Nassau* sailed from *Campeachy*, and having arrived off that port, made signals for launches to come out, into which the goods were put for the purpose of being run ashore. In this situation the goods were seized by two *Spanish* government brigs, it being contrary to the *Spanish* Laws to import *British* goods into the *Spanish* main. It seems that the goods were protected by the policy while on board the launches, such being the usual method of carrying on that trade. *Matthie* v. *Potts*. *H.* 42 *Geo.* 3. 23
2. A foreigner cannot recover back the premium paid by him upon a policy of insurance if the voyage be in contravention of the *British* laws. Therefore where a policy was effected upon a *Danish* ship at and from *Bengal* (in which there are *Danish* settlements) to *Copenhagen*, and the ship loaded at *Calcutta* contrary to the 12 *Car.* 2. *c.* 18. *s.* 1., the Court held the assured was not entitled to recover back the premium, even though it appeared that the practice of loading foreign ships at *Calcutta* had prevailed for a length of time, and had been authorised by act of parliament soon after the shipment in question. *Morck* v. *Abel*. *H.* 42 *Geo.* 3. *Page* 35
3. The commissioners appointed by the King under the 35 *Geo.* 3. *c.* 80. for the care, sale and management of such ships and cargoes belonging to the subjects of the *United States* as should be brought into the ports of this kingdom were held to have an insurable interest in *Dutch* Ships on their passage to this country, having been taken by a captain of a *British* man of war, under instructions from the admiralty to take all ships and cargoes belonging to the subjects of the *United States*, and to bring them into the ports of this kingdom to be detained provisionally. *Lucena* v. *Craufurd*, *H.* 42 *Geo.* 3. 75
4. Held also that they might recover for a loss upon such ships by perils of the sea, though the loss did not happen until after a proclamation had issued for general reprisals against the *Dutch*, *ib.*
5. An insurance effected in *Great Britain* on a *French* ship previous to the commencement of hostilities between *Great Britain* and *France*, does not cover a loss by *British* capture. *Furtado* v. *Rodgers*, *T.* 42 *Geo.* 3. 191
6. Policy of Insurance on a ship warranted *American*. To negative this warranty a sentence of condemnation of a *French* court at *St. Domingo* was given in evidence, which began thus: "Condemnation of the *English* ship *Mount Vernon*. Extracted from the books of the office of the Provisional Tribunal respecting prizes established at *St. Domingo*, We, *F. P.* judges," *&c.*; and after stating the circumstances of papers having been thrown overboard, the captain and supercargo having abandoned the ship, the captain being a *Portuguese*, without a certificate of his naturalization, and the *United States*, in their last treaty with *England*, having suffered to be added to the articles which had before been considered as contraband

of war, flaves, &c. with ſufficient motives to condemn the ſaid ſhips condemned the ſame as property belonging to the captor. Held that this ſentence was conclusive evidence that the ſhip was not *American*. *Bering v. Clagett*, T. 42 *Geo.* 3. *Page* 201

7. *Quære*, Whether, if a ſhip be warranted *American*, the aſſured does thereby undertake that ſhe ſhall be owned and navigated according to all the regulations of the *American* navigation act? *ib.*

8. A partial loſs on a policy on goods by reaſon of the damage is to be calculated by aſcertaining the difference between the reſpective groſs proceeds of the ſame goods when ſound and when damaged, and not the net proceeds. *Hurry v. The Royal Exchange Aſſurance Company*, M. 43 *Geo.* 3. 308

9. If a cargo of a periſhable nature be inſured from *A.* to *B*, with the uſual memorandum, and in the courſe of the voyage information be received by the maſter that the port of *B.* is ſhut againſt the ſhips of his nation, in conſequence of which the commander of the convoy orders the ſhip to proceed to another port, and the cargo be ſold there by orders of the Vice-Admiralty Court for a very ſmall ſum of money, the aſſured cannot abandon as for a total loſs. It ſeems that if the voyage be loſt in conſequence of the port of deſtination being ſhut up againſt the ſhip inſured, the aſſured cannot declare upon this as a loſs within the policy. *Hadkinſon v. Robinſon*, E. 43 *Geo.* 3. 388

10. Policy on fruit from *Cadiz* to *London*, with the uſual memorandum. In the courſe of the voyage the fruit was ſo much damaged by ſea water that it became rotten and ſtunk; and on the ſhip's arrival at an intermediate port, into which ſhe was driven, the government of the place prohibited the landing of the cargo. The ſhip alſo being too much damaged to proceed on the voyage, was ſold, and the cargo neceſſarily thrown overboard. Held that the aſſured were entitled to recover for a total loſs. *Dyſon v. Rowcroft*, T. 43 *Geo.* 3. 474

11. *A.* having effected one policy on ſhip and another on freight, and the ſhip having been detained by embargo in *Ruſſia*, he abandoned the ſhip to the underwriters on ſhip, and the freight to the underwriters on freight, at the ſame time receiving an authority from the underwriters on the ſhip to act for them, and endeavour to recover it. The ſhip having afterwards brought home the cargo which was on board at the time of the detention and earned freight accordingly, which *A.* received; held, that in an action by the underwriters on freight againſt *A.* they were entitled to the freight ſo received by him. *Leatham v. Terry*, T. 43 *Geo.* 3. *Page* 479

12. Policy of inſurance on board the *Catherine*, an *American* veſſel. After the policy was effected doubts having ariſen, whether the policy contained a warranty, the underwriters ſigned an agreement, that in caſe of capture or ſeizure, the aſſured, before they claimed for a loſs, muſt produce proofs of the ſhip being *American* bottom, and by bills of lading ſhew that the cargo had been ſhipped on account and riſk of *A. B.*, upon which they would ſettle by granting bills at four months for the amount of their ſubſcriptions, in full dependance that the inſured would uſe their beſt endeavours to recover the property as for account of the ſhippers. Held, that on proof being produced that the ſhip was *American* bottom, and the cargo ſhewn by bills of lading to have been ſhipped on account and riſk of *A. B.* the aſſured were entitled to recover, on a loſs by capture, notwithſtanding the production by the underwriters of any *French* ſentence of condemnation to falſify the warranty. *Lothian v. Henderſon*, T. 43 *Geo.* 3. 499

13. A ſentence of condemnation in a *French* Court of Admiralty is admiſſible evidence in an action here between the aſſured and underwriters of a policy of inſurance containing a warranty of neutrality. *ib.*

14. It ſeems that the ſentence of a foreign Court of Admiralty, condemning a ſhip warranted neutral, in which the conſider

ation leading to the judgment proceeds on the want of a document not required by the law of nations, but which adjudges "lawful prize" all the goods and effects which compose the cargo of the said ship, since the whole, owing to the captain not being provided with proper and regular dispatches and papers, is to be deemed the property of the enemies of the *French* Republic," is conclusive evidence against the warranty of neutrality. *Lothian* v. *Henderson*, T. 43 *Geo.* 3. *Page* 499

15. If a *Swedish* ship be insured at and from her loading port in the *East Indies* to *Gottenburgh*, and part of the cargo be laden in a *British* port in the *East Indies*, the insured cannot recover, the voyage being in contravention of the navigation laws. *Chalmers* v. *Bell*, H. 44 *Geo.* 3. 604

ISSUE.

See PLEADING, 10.

J.

JOINDER OF ACTIONS.

See PLEADING, 1.

JOINT ACTIONS.

See PLEADING, 8.

JUDGMENT.

See PLEADING, 11. 13.
PRACTICE, 20, 21.

The Defendant having given a warrant of attorney to confess judgment, took the benefit of an insolvent act, then became bankrupt, and obtained his certificate; after which the Plaintiff entered up a general judgment, and sued out a general execution. Held regular, no dividend appearing to have been made. *Edmonson* v. *Parker*, T. 42 *Geo.* 3. 285

L.

LACHES.

See PRACTICE, 12.

LAND-TAX.

1. Buildings of a College in one of the Universities taken into and made part of the College between the passing of the first land-tax act and the act which made that tax perpetual, are exempted from the land-tax. *All Souls College* v. *Coffar*, H. 44 G. 3. *Page* 635
2. But where a college, soon after the passing of the first land-tax act, purchased lands of a parish under a private act of parliament, which provided that the college should pay all taxes which the premises then were, or should thereafter be subject to, it was held that the lands purchased were not exempted from the land-tax. *ib.*

LARCENY.

See INDICTMENT, 1.
POST-OFFICE, 2.

LEASE.

If a lease be granted for 7, 14, or 21 years, the lessee only has the option at which of the above periods the lease shall determine. *Dann* v. *Spurrier*, E. 43 *Geo.* 3. 442

LETTERS.

See POST-OFFICE, 1, 2.

LIBEL.

See SLANDER.

LICENCE.

See INSURANCE, 1.

If a licence be obtained from the *British* government by *A.* to import from an enemy's country in six ships such goods as should be specified in his bills of lading, and goods be imported on board one of the six ships on account of *B. C* and *D.* to whom several bills of lading are sent for their respective goods, and one general bill of lading for the whole cargo be sent to *A.*, the whole cargo will be protected. *Dessin* v. *Parry*, H. 42 *Geo.* 3. 3

LIEN.

See STOPPAGE IN TRANSITU.

1. *A.* of *Newcastle*, shipped goods for *London* to order of *B.*, before their arrival *B.* wrote to

to say that he was in failing circumstances, and would not apply for the goods on their arrival. To this *A.* returned a general answer without making any mention of the goods, but immediately left *Newcastle* for *London*, and on his arrival applied at the wharf of *C.*, where the goods had in the mean time arrived (and where goods shipped for *B.* usually were landed and kept till sent for by him,), tendering the freight and charges paid for the goods, and requiring a delivery of them, which was refused, unless upon payment of a general balance due from *B.* to *C.* for wharfage. Held that the contract as between *A.* and *B.* having been rescinded previous to the arrival of the goods, *C.* had no right to retain against *A.* for a general balance due to him from *B.* *Richardson* v. *Goss.* E. 42 *Geo.* 3. *Page* 119

2. *Semble*, that the goods were no longer *in transitu* when arrived at the wharf of *C.*, where the goods of *A.* where usually landed and kept. *ib.*

3. *A.*, a factor, having *sold* goods of *B.* in his own name to *C.*, the latter, without paying for these goods, sent another parcel of goods to *A.* to sell for him, never having employed *A.* as a factor before. *C.* then became bankrupt, and his assignees claimed the goods sent by him to *A.*, and which still remained unsold, tendering the charges upon those goods. *A.* refused to deliver them up, claiming a lien upon them for the price of the former goods sold by him to *C.*, there being a balance then due from *B.* to himself. Held that the assignees were entitled to recover. *Houghton* v. *Matthews*, T. 43 *Geo.* 3. 485

LORDS' ACT.

1. If a note for payment of the allowance to a prisoner under the Lords' Act be dated on a *Sunday* and delivered on a *Monday*, and contain a general promise to pay the allowance weekly, the prisoner is entitled to be discharged. *Copleston* v. *Pugh*, T. 42 *Geo.* 3.

2. *Qy.* Whether such a note ought not to contain an express promise to pay the allowance on a *Monday*, although it be dated on that day of the week, *Page* 184

LUNATIC.

A lunatic may be brought up by *habeas corpus* from *St. Luke's* hospital to be surrendered in discharge of his bail. *Pillop* v. *Seaton*, M. 44 *Geo.* 3. 550

M.

MANOR.

See COPYHOLD, 1.
PARTITION, 1.

MANUMISSION.

See SLAVE, 1.

MASTERS AND SERVANT.

See ASSUMPSIT, 1.
SLANDER, 2.

MASTERS IN CHANCERY.

See RATE, 1.

MEMORIAL.

See ANNUITY, 1.

MONEY HAD AND RECEIVED.

See BANKRUPT, 6.

1. *A.* by his will devised to *B.*, *C.*, *D.* and *E.* two parcels of land upon trust to sell and divide the money among his brother's and sister's children. *B.*, *C.* *D.* and *E.*, the latter being one of 24 persons entitled under the will to a share of the money, were proceeding to sell, when it was agreed by the three first trustees and the 23 other persons entitled to the money, that *E.* should become the purchaser of the two parcels of land, paying 300*l.* for one and 700*l.* for the other. A conveyance was accordingly prepared and executed by *B.* and *C.* only, upon which *E.* took possession of the lands and paid the purchase-money, which was divided among the several persons entitled under

under the will. *E.* being afterwards evicted from the ſmaller parcel in conſequence of a defect in the title derived under the will, brought an action for money had and received againſt one of the 23 perſons to recover the ſhare of the 300*l.* received by him, at the ſame time refuſing to give up the parcel of land for which 700*l.* had been paid. Held that he was entitled to recover. *Johnſon* v. *Johnſon*, *E.* 42 *Geo.* 3. *Page* 162

2. *A.* having ſold certain leaſehold premiſes to *B*, aſſigned them by indenture, containing a proviſo that *B.* ſhould not aſſign over until the whole of the purchaſe-money ſhould have been paid, and *B.* and *C.* covenanted for themſelves, their executors, adminiſtrators, and aſſigns, for the payment of the money. The premiſes having been taken in execution for a debt of *B.*, who had not paid the purchaſe-money, were ſold by the ſheriff to *D.*, who paid down a depoſit, and agreed to complete the purchaſe on having a good title. Held that the non-payment of the purchaſe-money by *B.* was a ſufficient objection to the title, and that *D.* might recover back his depoſit in an action for money had and received. *Elliott* v. *Edwards*, *T.* 42 *Geo.* 3. 181

3. A bill being preſented by the indorſee to the drawee for acceptance, the latter on accepting it ſaid, that he expected a remittance from the drawer in a few days, and that as he had a bill of the drawer in his hands which would be paid, he would take all riſks. Held that this converſation, together with the bill accepted by the drawee, did not amount to ſufficient evidence to entitle the indorſee to recover againſt the drawee the amount of the bill accepted on a count for money had and received. *Whitwell* v. *Bennett*, *M.* 44 *Geo.* 3. 559

NAVIGATION ACTS,

See INSURANCE, 2, 15.

NOTICE,

See PRACTICE, 1.

NOTICE OF ACTION.

A notice of action to a magiſtrate under the 24 *Geo.* 2. *c.* 44 *ſ.* 1. indorſed with the name of the Plaintiff's attorney, and the words, "of *Birmingham*," as deſcribing the place of his abode, held ſufficient. *Oſborn* v. *Gough*, *M.* 44 *Geo.* 3. *Page* 551

O

OFFICER,

See NOTICE OF ACTION, 1.
TRESPASS, 1, 2.

P

PACKER.

See STOPPAGE IN TRANSITU, 3, 4.

PARTICULARS, BILL OF,

See PRACTICE, 17.

PARTITION.

The cuſtomary tenements in the north of *England*, which are parcels of the reſpective manors in which they are ſituate and deſcendible from anceſtor to heir by the hereditary right called tenant right, and held by the lord according to the cuſtom, are not within the ſtatute of partition. *Burrell* v. *Dodd*, *E.* 43 *Geo.* 3. 378

PARTNERS,

See PLEADING, 6.

1. If three partners (two of whom reſide abroad, and one in *England*) be ſued for a partnerſhip debt, and the partner reſident in *England* appear to the action, but refuſe to appear for the partners reſidenc abroad, the ſheriff under a diſtringas againſt the two partners may take partnerſhip effects, though paid for by the partner reſident in *England* alone, to whom the partnerſhip was legally indebted; and the Court will not relieve him againſt ſuch diſtreſs. *Morley* v. *Strombom* and others, *M.* 43 *Geo.* 3. 254

2. If a *fi. fa.* iſſue againſt one of ſeveral partners, the Court will not, at the requeſt of the partnerſhip creditors, give the ſheriff time to return the writ until an account can be taken of the ſeveral claims upon the partnerſhip property. *Parker* v. *Piſtor*, *M.* 43 *Geo.* 3. *Page* 288

3. A *fi. fa.* having iſſued againſt the effects of the Defendant, who was jointly concerned in a manufactory with 25 other perſons, to whom he was indebted to a greater amount than his whole ſhare, and the ſheriff having ſeized the whole of the partnerſhip property, the Court refuſed to refer it to the prothonotary to inquire what was the Defendant's intereſt in the effects ſeized. *Chapman* v. *Koops*, *M.* 43 *Geo.* 3. 289

PATENT.

See AGREEMENT, 2.
BANKRUPT, 8, 9.

PAVING RATE.

See RATE, 1.

PAYING MONEY INTO COURT.

1. In an action for breach of a contract to deliver goods at a certain price per ton, the Court will not allow the Defendant to pay money into Court. *Strong* v. *Simpſon*, *H.* 42 *Geo.* 3. 14

2. If the Defendant pay money into Court generally upon a declaration containing a count on a policy of inſurance, together with the money counts, and it appear that the Plaintiff by his conduct previous to the trial, induced the Defendant to believe that the only point to be tried was a queſtion of fraud, and ſuffered him to prepare his evidence accordingly, the Court will not allow the Plaintiff to object to the receipt of that evidence at the trial, on the ground of the contract having been admitted by payment of money into Court. *Muller* v. *Hartſhorn*, *M.* 44 *Geo.* 3. 556

3. In *C. B.* if the Plaintiff proceed to trial after money paid into Court, he is notwithſtanding entitled to coſts up to the time of the money being paid in. *Muller* v. *Hartſhorn*, *M.* 44 *Geo.* 3. *Page* 556

PEER.

See PLEADING, 2, 3.

PLEADING.

See BANKRUPT, 5, 6.
BY-LAWS, 1.
COPYHOLD, 1.
EVIDENCE, 3, 4.
INDICTMENT, 1.
JUDGMENT, 1.
QUARE IMPEDIT, 1.
TRESPASS, 1, 2.
USURY, 2.

1. An executor cannot join a count upon a bond given to his teſtator, and a count upon a bond given to himſelf as executor in the ſame action. *Hoſier* v. *Lord Arundel*, *H.* 42 *Geo.* 3. 7

2. If a Peer be ſued by bill, no objection can be taken to ſuch proceeding, except by plea in abatement. *ib.*

3. *Quære*, Whether even in that caſe ſuch an objection could prevail? *ib.*

4. If a declaration on a policy of inſurance aver the goods to have been ſeized in a forcible and hoſtile manner by certain perſons enemies of our Lord the King to the Plaintiff unknown, and it appear in evidence that they were ſeized by the *Spaniſh* government as about to be imported into the *Spaniſh Main* contrary to the laws of *Spain*, ſuch loſs is not well deſcribed by the covenant in the declaration. *Matthie* v. *Potts*, *H.* 42 *Geo.* 3. 23

5. *A.* agreed in writing to pay the rent of certain tolls which he had hired, "to the treaſurer of the commiſſioners." Held that no action for the rent could be maintained in the name of the treaſurer. *Pigott* v. *Thompſon*, *E.* 42 *Geo.* 3. 147

6. If defamatory words be ſpoken of two partners reſpecting their trade, they may maintain a joint action for the ſlander, aver-

ring special damage. *Cook* v. *Batcheller*, *E.* 42 *Geo.* 3. *Page* 150

7. The first count of a declaration stated that the Defendant heretofore, to wit, on such a day, drew a bill of exchange bearing date the day and year aforesaid, payable two months after date. The second count stated that afterwards, to wit, on the day and year aforesaid, the Defendant drew a certain other bill of exchange, payable two months after date; without mentioning any express date in either count. Held that both counts were good. *Hague* v. *French*, *T.* 42 *Geo.* 3. 173

8. *A. B.* and *C.* having been appointed assignees under a commission of bankrupt, and having acted as such, *A.* and *B.* pay each half of his bill to the solicitor. Held that *A.* and *B.* could not maintain a joint action against *C.* for his proportion of the money paid, but must each bring a separate action. *Brand and Herbert* v. *Boulcott*, *M.* 43 *Geo.* 3. 235

9. A replication to a plea of tender, stating an original writ sued out and returned before the tender, but not proceeded upon, and then a second original writ sued out after the tender, and proceeded upon, but unconnected with the first writ, is no answer to the plea. *Stratton* v. *Savignac*, *H.* 43 *Geo.* 3. 330

10. If to an avowry for 120*l.* rent in arrear, the Plaintiff plead "that the said 120*l.* is not due," and the Defendant join issue thereon, and at the trial it appear that 24*l.* only is due, upon which the Plaintiff objects that the evidence does not support the issue joined by the Defendant; yet if a verdict be taken for 24*l.* subject to the opinion of the Court, such finding will cure the defect in the formality of the issue. *Cobb* v. *Bryan*, *H.* 43 *Geo.* 3. 348

11. No addition having been given to the Defendant, either in the recital of the writ or in the subsequent part of the declaration, the defendant pleaded the statute of additions 1 *H.* 5. in abatement, and prayed judgment of the declaration. The Court held the plea a nullity, and gave leave to the Plaintiff to sign judgment. *Gray* v. *Sidneff*, *E.* 43 *Geo.* 3. *Page* 395

12. In the count of a writ of right it is not sufficient to state that the lands descended to four women as nieces and co-heirs of *J. S.* without shewing how they were nieces. *Dumsday* v. *Sir Richard Hughes and John Bedford*, *T.* 43 *Geo.* 3. 453

13. Judgment by default having been suffered in an action on a bond, the Plaintiff entered up judgment for the penalty, together with 9*l.* 10*s.* for damages and costs. A writ of enquiry having been executed, damages were assessed at 1115*l.* 13*s.* 4*d.* and costs 40*s.* and the Plaintiff entered up another judgment for those damages, together with 31*l.* 6*s.* 8*d.* for costs; but afterwards entered a *remittitur* on the roll for the costs. Held that the second judgment was erroneous. *Hankin* v. *Broomhead*, *H.* 44 *Geo.* 3. 607

PENALTY.

If a party agree not to do some specified act under a "penalty" of 100*l.* such sum cannot be considered in the nature of liquidated damages. *Smith* v. *Dickenson*, *H.* 44 *Geo.* 3. 630

POST OFFICE.

1. It seems that it is not a felony within 7 *Geo.* 3. *c.* 50. *s.* 1. for a person employed in the Post Office to steal out of a letter entrusted to his care, a draft on a *London* banker, purporting to be drawn in *London*, but actually drawn above 10 miles from *London*, on unstamped paper. *Rex* v. *Pooley*, *H.* 43 *Geo.* 3. 311

2. It seems also that *s.* 2. of the same act does not apply to persons employed in the Post Office; and that a person of that description therefore, who steals a letter out of the Post Office, is not guilty of felony under that section. *ib.*

PRACTICE.

See AFFIDAVIT TO HOLD TO BAIL.
AMENDMENT, 1.
BAIL.
BANK ACT, 1, 2.

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PLEADING, 11.
PROCEEDINGS, STAYING AND SETTING ASIDE, 1.
TRIAL, 1.

1. Notice having been given of executing a writ of inquiry on "*Tuesday* the 14th day of *Jan.* inſtant," when the 14th of *January* fell on a *Thurſday*, and on which day the writ of inquiry was executed; the Court of *C. B.* refuſed to ſet aſide the execution of the writ of inquiry for this irregularity, but rejected "*Tueſday*" as ſurpluſage, it appearing that the Defendant was not miſled thereby. *Hatten* v. *Harriſon*, *H.* 42 *Geo.* 3. *Page* 1

2. After plea pleaded the venue cannot be changed. *Talmaſh* v. *Penner*, *H.* 42 *Geo.* 3. 12

3. But if the Defendant plead pending a rule *niſi* for changing the venue, the Court will notwithſtanding allow him to change the venue. *ib.*

4. All arguments upon demurrers and other arguments in this Court are to be heard on *Mondays* and *Thurſdays* only. *Regula Generalis*, *H.* 42 *Geo.* 3. 110

5. If an appearance be entered in the name of an agent to the attorney for the Defendant, and the plea be delivered in the name of the attorney, and the Plaintiff thereupon enter up judgment for want of a plea, the Court will ſet aſide that judgment for irregularity. *Buckler* v. *Rawlins*, *E.* 42 *Geo.* 3. 111

6. The judgment in an original action, and the judgments in the actions againſt the bail, may be ſet aſide upon one motion, and one affidavit entitled in the original action. *Winder* v. *Wood*, *E.* 42 *Geo.* 3. 118

7. A rule for an attachment againſt the ſheriff for not bringing in the body, having been obtained on the 19th of *November*, and the attachment not ſued out and ſerved on the ſheriff until the 9th *March* following, the Court held the ſheriff diſcharged, and ſet the attachment aſide. *Rex* v. *Perring*, *E.* 42 *Geo.* 3. *Page* 151

8. In *C. B.* a plea of bankruptcy muſt be ſigned by a Serjeant. *Pitcher* v. *Martin*, *E.* 42 *Geo.* 3. 171

9. If a declaration in debt demand 2000*l.* and contain ſeveral counts, each of which ſtates a debt of 224*l.* 7*s.* 4½*d.* and the Defendant plead thereto that he does not owe the ſaid ſum of 224*l.* 7*s.* 4½*d.*, the Plaintiff may ſign judgment for want of a plea. *Macdonnell* v. *Macdonnell*, *T.* 42 *Geo.* 3. 174

10. A ſummons for further time to plead not attended by the party taking it out, does not wave the neceſſity of a rule to plead. *Decker* v. *Shedden*, *T.* 42 *Geo.* 3. 180

11. If a Plaintiff having taken an aſſignment of the bail bond while the action is pending, proceed upon it after the cauſe is out of Court, the proceedings cannot be ſet aſide for irregularity. *Pigott* v. *Truſte*, *M.* 43 *Geo.* 3. 221

12. But the Court will ſtay ſuch proceedings if it appear that the Plaintiff has been guilty of laches. *ib.*

13. If *A.* being arreſted by *B.* on proceſs of the Common Pleas, give bail to the ſheriff, and before the return of the writ, being again arreſted by *C.* is committed to the Fleet priſon, after which, and before the return of the firſt writ, *B.* takes an aſſignment of the bail bond and proceeds thereon, the Court will ſtay ſuch proceedings, but will not make *B.* pay coſts, for they will not try upon affidavit, whether he knew or not that *A.* was in cuſtody, but will conſider him ignorant of that fact unleſs notice of ſurrender has been regularly given. *Harding* v. *Hennem*, *M.* 43 *Geo.* 3. 232

14. If a verdict for a Plaintiff be taken at *niſi prius*, ſubject to the award of an arbitrator, and the rule of reference be made a rule of Court, the verdict may be entered according to the award of the arbitrator, without any application to the Court for that purpoſe. *Burrowdale* v. *Hitchener*, *M.* 43 *Geo.* 3. 244

15. If in such case the award be made before the term, the Defendant can only impeach it within the four first days of term, *Borrowdale* v *Hitchener*, *M.* 43 *G.* 3. *P.* 244

16. Personal service of the award is not necessary to warrant the issuing of execution in such case, if the attorney of the Defendant has been served with the award, *ib.*

17. In an action of *assumpsit* for non-performance of a contract for the sale of a house, with counts to recover back the deposit, the Plaintiff having in his first count alleged that the Defendant, who was to make a good title, had delivered an abstract which was "insufficient, defective, and objectionable," the Court obliged the Plaintiff to give a particular of all objections to the abstract arising upon matters of fact. *Coltt* v. *Thompson*, *M.* 43 *Geo.* 3. 246

18. No judgment can be signed upon any warrant authorising any attorney to confess judgment without such warrant being delivered to, and filed by the clerk of the docquets; who is to file the same in the order in which they are received, *Regula Generalis*, *M.* 43 *Geo.* 3. 310

19 Every attorney of *C. B.* who shall prepare any warrant of attorney to confess any judgment which is to be subject to any defeasance, must cause such defeasance to be written on the same paper or parchment on which the warrant of attorney is written, or cause a memorandum in writing to be made on such warrant, containing the substance and effect of such defeasance. *ib.*

20. If after the time for pleading is out, but before judgment signed by the Defendant, the Court, on his application, stay proceedings till the Plaintiff give security for costs, to be approved by the prothonotary, the Plaintiff, though he give security *instanter*, which is accepted by the Defendant, is not at liberty to sign judgment before the opening of the office on the next morning. *Decker* v. *Thomson*, *H.* 43 *Geo.* 3. 319.

21. A Plaintiff having tendered an issue to a plea, and demanded a rejoinder, where the Defendant was under terms to rejoin *gratis*, the Court held the judgment regular, but set it aside without costs, because the Plaintiff might have added the *similiter* himself. *Wye* v. *Fisher*, *T.* 43 *Geo.* *Page* 443

22 An application to change the venue from *A.* to *B.* in an action for goods sold and delivered, upon an affidavit that the cause of action arose at *B.* and not elsewhere, may be successfully answered by an affidavit that the goods were sold at *C.* *Collins* v. *Jacobs*, *M.* 44 *Geo.* 3. 579

PRESENTATION,

See QUARE IMPEDIT, 1.

PRIZE.

If an admiral, commander in chief upon a station, come home by leave of the Admiralty for the re-establishment of his health, leaving the squadron under the command of the flag-officer next in seniority, but retain his commission as commander in chief, *Quære*, Whether he be entitled to share in prizes taken by the cruizers of the squadron during his absence? *Lord Nelson* v. *Tucker*, *M.* 43 *Geo.* 3. 257

PRISON BOOKS,

See EVIDENCE, 2.

PROCEEDINGS, STAYING AND SETTING ASIDE,

See BAIL, 1, 2.
BARON AND FEME, 1, 2.
COSTS, 1.
PRACTICE, 5. 7. 11, 12, 13.
TRIAL. 1.
VENDOR AND VENDEE, 2.

The Court will not stay proceedings in replevin upon payment of costs on the application of the Defendant. *Hodgkinson* v. *Snibson*, *H.* 44 *Geo.* 3. 603

PROCESS,

See PARTNERS 1, 2, 3.

PROMISSORY NOTES,

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

ing the policy. *Pitchard* v. *Whitmore*, *Guild Hall Sittings after Mich* 1780, *coram Buller J.* *Page* 155 *n*

12. The Plaintiff in replevin pleaded in bar to an avowry for damage feasance that the *locus in quo*, from time whereof, &c. ought to be open and common "one or before the 15th of *October*, when the corn was cut and carried, and from thence for a long time, to wit, for three hours and upwards," that the Plaintiff when, &c. put in his cattle "the same time being when the said field was and ought to be open and common *as aforesaid*." Held that the plea was bad for uncertainty, even after verdict, the right of common being too generally described both in its commencement and conclusion. *Da Costa* v. *Clarke*, T. 40 *Geo.* 3. 257

13. A declaration stated that in consideration that the Plaintiff had sold to the Defendant *a certain horse* of the Plaintiff at and for *a certain quantity of certain oil*, to be delivered within *a certain time*, which had elapsed before the commencement of the suit, the Defendant promised to deliver the said oil accordingly: Held well enough after verdict. *Ward* v *Harris*, T. 40 *Geo.* 3. 265

14. In a declaration for slander the Plaintiff stated that he was a jobber or dealer in the funds, and as such jobber or dealer had been accustomed lawfully to contract, and had from time to time lawfully contracted, &c. that the Defendant said of him as such jobber or dealer, "he is a lame duck," meaning that he had not fulfilled his contracts in respect of the said stocks or funds, in consequence of which divers persons refused to fulfil their contracts with him (specifying the contracts,) and he was prevented from fulfilling his contracts with other persons: Held that it did not sufficiently appear either that the words were spoken of lawful contracts, or that the Plaintiff was a lawful jobber or dealer in the funds; and that the declaration was therefore bad *Morris* v. *Langdale*, *Mi.* 41 *Geo.* 3. 284

15 *Qu.* Whether, under such circumstances it can be stated as special damage, that divers persons refused to fulfil their contracts with the Plaintiff, since he might recover a compensation by action if the contracts were lawful? *id.* *ib.*

16. Declaration that "in consideration that the Plaintiff had taken the Defendant's goods on board his ship to be carried to *A*, the Defendant promised to pay the money due for freight and carriage of the same on the delivery of the bill of lading, that the bill of lading was delivered, by reason whereof the Defendant became liable to pay a large sum, to wit, 20*l.* for freight and carriage of the said goods:" Held bad on demurrer, because it did not appear that any thing became due for freight on the delivery of the bill of lading. *Baker* v. *Dening*, *M.* 41 *Geo.* 3. *P.* 321

17. *Qu.* Whether in alleging the promise to pay in the above case, the Plaintiff should not have stated the specific sum, or have said, so much as should be reasonably due? *id.* *ib.*

18. In an avowry Defendant averred that all those whose estate he now has, &c. *from time whereof, &c.* have been accustomed to have, and of right *during all the time aforesaid* ought to have had, and still of right ought to have common of pasture in the *locus in quo*: Held bad, and that it did not amount to an averment of right of common at all times of the year. *Hawkins* v. *Eccles*, *H.* 41 *Geo.* 3. 359

19. If a Defendant in replevin plead by way of justification of the taking, that he was *possessed* of a messuage with common appurtenant, and that the Plaintiff's cattle were damage feasant, on the common, and conclude in bar without praying a return, it seems that such a plea is bad. *ib.*

20. Where three parish churches have been united by 22 *Car.* 2. *c.* 11. the benefice may be described in pleading as one rectory. *Wilson*, *q. t.* v. *Van Mildert*, *E.* 41 *Geo.* 3. 394

21 The three first counts of a declaration in assumpsit against executors stated promises made by the testator, the fourth was for money had and received by the Defendants "as such executors as aforesaid," stating a promise to pay by them "executors as aforesaid," and the last was upon a count stated by the Defendants "executors as aforesaid," and stating the promise to pay in the same manner: Held bad upon gene-

tal demurrer. *Brigden* v. *Parkes*, E. 41 *Geo.* 3. *Page* 424

22. Treſpaſs for aſſault and falſe impriſonment may be laid, *diverſis diebus et vicibus*. *Burgeſs* v. *Freelove*, E. 41 *Geo.* 3. 425

23. Aſſumpſit on a note payable by inſtalments, plea in bar as to the ſaid ſeveral cauſes of action, except the laſt inſtalment, that "the ſaid ſeveral cauſes of action did not, nor did any of them a crue within ſix years:" Held on ſpecial demurer, that though ſome of the inſtalments might be barred and the others not, yet that the introduction to the plea and the body of it were inconſiſtent. *Gray* v. *Pindar*, E. 41 *Geo.* 3. 427

24. Plaintiff declared againſt Defendant as acceptor of a bill of exchange, payable to certain perſons uſing the firm of Meſſrs. *M'Brair*, *Watſon*, and Co.; Defendant pleaded that the ſaid Meſſrs. *M'Brair*, *Watſon*, and Co. had accepted ſatisfaction; Plaintiff replied that the ſaid perſons ſo as aforeſaid uſing the firm of Meſſrs. *M'Brair* and Co. (leaving out the name of *Watſon*) did not accept ſatisfaction, and concluded to the country. *Semb.* that this variance could only be taken advantage of on ſpecial demurrer. *Bell* v. *Da Coſta*, E. 41 *Geo.* 3. 446

25. Replevin of cattle taken in *A*. The Defendant avowed the taking in *A*, under a demiſe of certain premiſes of which *B*. was parcel, and becauſe the cattle were damage feaſant in *B*. he took them and drove them through *A*. in his way to the pound; and upon general demurer the avowry was held to be well pleaded. *Abercrombie* v. *Parkurſt*, T. 41 *Geo.* 3. 460

26. In an action againſt the ſheriff for an eſcape on meſne proceſs, it is ſufficient to aver that the ſheriff had not the body at the return of the writ, without negativing the appearance of the party or his putting in bail. *Stevin* v. *Perrin*, M. 42 *Geo.* 3. 561

27. If the writ iſſue from *C. B.* and the declaration for an eſcape aver that the defendant had not the body "before our ſaid Lord the King" on the return day, it is bad on ſpecial demurrer, *id.* *ib.*

28. If a demandant in a writ of right count upon the ſeiſin of his anceſtor "*in dominio ſuo ut de feodo*," omitting "*et de jure*," it ſeems to be bad. *Slade et Ux.* v. *Dowland* *in falſe judgment*, M. 42 *Geo.* 3. *Page* 570

29. If the Demandant in deducing his title through a female deſcribe her as "ſiſter *and heir* of *J. S.*" and it appear upon the face of the count that *J. S.* left a ſon who ſurvived his aunt, it is fatal; although it alſo appear that upon failure of iſſue of the ſon, the iſſue of the ſiſter of *J. S.* became his heir, *id.* *ib.*

POLICY,

See INSURANCE.

POST-OFFICE,

See FRANKING.

POWER,

See AUTHORITY.

PRACTICE,

See AFFIDAVIT TO HOLD TO BAIL.
AMENDMENT,
ATTORNEY.
BAIL.
COSTS.
ESCAPE, 2.
INTEREST OF MONEY, 1.
LUNATIC, 1.
OYER.
PAYMENT OF MONEY INTO COURT.
PRISONER.
PROCESS, 2.
STAYING AND SETTING ASIDE PROCEEDINGS.
VENUE.
WARRANT OF ATTORNEY.

1. The Court will allow *non eſt factum* and uſury to be pleaded together to debt on bond. *Leehmere* v. *Rice*, M. 40 *Geo.* 3. 12

2. Copy of a writ againſt *William Armytage*; notice to appear "*Catherine Waller* you are ſerved, &c.;" miſtake held fatal. *Jones* v. *Armytage*, M. 40 *Geo.* 3. 38

3. If bail be brought up on the ſame day on which an attachment has been obtained againſt the ſheriff, the Court will permit them to juſtify, and ſet aſide the attachment

ment on payment of Costs. *Turner* v. *Briſtow*, *M.* 40 *Geo.* 3. *Page* 38

4. In *C. B.* notice of declaration is not neceſſary in bailable actions. *Holen* v. *Bargus*, *M.* 40 *Geo.* 3. 42

5. If two attornies' clerks be put in as bail, the Plaintiff may treat ſuch bail as a nullity, and take an aſſignment of the bail bond. *Wallace* v. *Arrowſmith*, *M.* 40 *Geo.* 3. 49

6. If a Plaintiff, after entering up judgment for himſelf upon two counts, diſcover an error in one of them, he may wave his judgment on that count, and enter it for the Defendant. *Spicer* v. *Teaſdale*, *M.* 40 *Geo.* 3. *ib.*

7. Service of a declaration in ejectment on the wife of the tenant in poſſeſſion is ſufficient. *Doe ex dem. Baddam* v. *Roe*, *M.* 40 *Geo.* 3. 55

8. The Court of *C. B.* will refer a bill of exchange to the Prothonotary, to compute principal, intereſt, *exchange*, *re-exchange* and coſts. *Goldſmid and others* v. *Taite and another*, *M.* 40 *Geo.* 3. *ib.*

9. But not to compute charges and expences. *ib.*

10. The Court will not allow *non-aſſumpſit* and alien enemy to be pleaded together. *Thyatt* v. *Young*, *H.* 40 *Geo.* 3. 72

11. *Affidavit* of ſervice of a declaration in ejectment made by a perſon who ſaw the declaration ſerved, and heard it explained to the tenant in poſſeſſion, is ſufficient to entitle the Plaintiff to judgment againſt the caſual ejector. *Goodtitle ex dem. Wanklin* v. *Badtitle*, *H.* 40 *Geo.* 3. 120

12. The Defendant being arreſted on a writ returnable the laſt return of *Michaelmas* Term, put in bail on the laſt day of that term, who juſtified on the firſt day of *Hilary* term; a declaration was delivered on the the third day of *Hilary* term, and in the ſame term judgment was ſigned for want of a plea: Held regular, the Defendant not being entitled to an imparlance. *Bailey* v. *Hantler*, *H.* 40 *Geo.* 3. 126

13. The allowance of a writ of error may be ſerved before the Plaintiff is entitled to ſign final judgment. *Payne* v. *Whaley*, *E.* 40 *Geo.* 3. 137

14. If the writ by which a replevin is removed be returnable on the firſt return of the term, and the Plaintiff do not declare within four days before the end of that term, the Defendant is entitled to an imparlance, though he has not appeared within the term.—*Thompſon* v. *Jordan*, *E.* 40 *Geo.* 3. *Page* 137

15. If iſſue be joined on one of three pleas, and judgment be entered by default upon the two others, the Plaintiff cannot execute a writ of inquiry on thoſe pleas on which he has judgment, but muſt award jury proceſs *tam ad triandum quam ad inquirendum*. *Dicker* v. *Adams*, *E.* 40 *Geo.* 3. 163

16. When the Plaintiff enters an appearance for the Defendant under the ſtatute, judgment may be ſigned without any demand of a plea. *North* v. *Lambert*, *T.* 40 *Geo.* 3. 218

17. A *capias ad reſpondendum* againſt bail was teſted of a day, prior to the return of the *ca. ſa.* againſt the principal, but was not in fact ſued out till afterwards: Held regular. *Pinero* v. *Wright*, *T.* 40 *Geo.* 3. 235

18. If a Defendant be holden to bail under a judge's order, a material fact being concealed from the judge which would probably have induced him to refuſe the order; the Court will on application diſcharge the Defendant, even though there was a ſufficient *affidavit* of debt, independent of the order. *Davies* v. *Chippendale*, *M.* 41 *Geo.* 3. 282

19. But they will not diſcharge him from a detainer lodged againſt him by a third perſon while in cuſtody under the judge's order. *ib.*

20. To a replication of *nul tiel record* and day given, if the Defendant demur, the Plaintiff need not join in demurrer, but if the record is not produced may ſign judgment. *Tipping* v. *Johnſon*, *M.* 41 *Geo.* 3. 302

21. If the Defendant's attorney admit in effect, though not in terms, that a writ of error ſued out by him has been brought for delay, the Plaintiff is at liberty to proceed on the judgment. *Miller* v. *Couſins*, *M.* 41 *Geo.* 3. 329

22. A joinder in demurrer must be signed by a ſerjeant. *Brooker* v. *Simpſon*, *M.* 41 *Geo.* 3. *Page* 336

23. If the rule of allowance of bail be not ſerved on the Plaintiff's attorney, he may take an aſſignment of the bail bond, though he knows of the juſtification. *Holland* v. *White*, *M.* 41 *Geo.* 3. 341

24. If a declaration be indorſed "to plea in ——," it muſt be underſtood to mean within the number of days allowed by the rule of the Court. *Hifferman* v. *Langelle*, *H* 41 *Geo.* 3. 363

25. A writ of error operates as a *ſuperſedeas* from the time of the allowance though it be not ſerved till after execution. *Meagher* v. *Vandyck*, *H.* 41 *Geo.* 3. 370

26. The rule that final judgment cannot be ſigned till four days after the return of the *habeas corpora juratorum* does not extend to the caſe where the term cloſes before the four days are expired. *Thomas* v. *Ward*, *E.* 41 *Geo.* 3. 393

27. If a Defendant being arreſted upon proceſs in *K. B.* give a warrant of attorney to confeſs judgment, and be afterwards holden to bail in *C. B.* in an action upon that judgment, the Court will diſcharge him upon a common appearance. *Solkeld* v. *Lands*, *E.* 41 *Geo.* 3. 416

28. A Defendant who is under terms to plead iſſuably, is not at liberty to take advantage of any objections upon ſpecial demurrer, of which he could not have availed himſelf upon general demurrer. *Bell* v. *Da Ceſta*, *E.* 41 *Geo.* 3. 446

27. If *A.* agree to buy of *B.*, and *B.* to ſell to *A.*, goods at a certain price, to be delivered between ſuch a day and ſuch a day, and *B.* fail to deliver the goods within the time; it is ſufficient for *A.* in declaring on the contract to aver, that he was during all the time and ſtill is ready and willing to receive and pay for the goods, without making any allegation of an actual tender and refuſal. *Waterhouſe* v. *Skinner*, *E* 41 *Geo.* 3. 447

28 The Defendant in replevin having averred in his cognizance that the Plaintiff held the land under "a certain demiſe to him the ſaid *J. L.*, (the Plaintiff) theretofore made." The Plaintiff pleaded in bar that he did not hold under a demiſe in manner and form. Upon this Defendant obtained an order to amend, by ſtriking out the words "to him the ſaid *J. L.*" with liberty to the Plaintiff to plead *de novo*, and that in caſe the Plaintiff ſhould plead new matter, the Defendant ſhould pay all the coſts of the amendment. The Defendant having amended accordingly, the Plaintiff demurred ſpecially, and aſſigned for cauſe that it did not appear to whom the demiſe was made: Held that the demurrer was not new matter. *Lees* v. *Warliters*, *T.* 41 *Geo.* 3. *Page* 465

29. In an action of treſpaſs, directed by the Lord Chancellor to try a queſtion of bankruptcy, the court of *C. B.* will not reſtrain the Defendant from pleading the general iſſue, together with ſpecial juſtifications. *M'Connell* v. *Hector*, *M.* 40 *Geo.* 3. 549

PREMIUM,

See INSURANCE, 1, 2.

PREROGATIVE,

See AUTHORITY, 3.

PRISONER,

See EXECUTION, 1.
HABEAS CORPUS, 1, 2.

1. The Court will not diſcharge a Defendant out of cuſtody on the ground of the *affidavit* of the delivery of the declaration not having been filed within 20 days of the delivery, if it be by way of detainer. *Davis* v. *Davenport*, H. 40 *Geo* 3. 72

2. If a priſoner be prevented from juſtifying bail by the Plaintiff deſiring further time to enquire into their ſufficiency, he is from the time of his notice of juſtification entitled to a demand of a plea before judgment can be ſigned againſt him. *Davies* v. *Chippendale*, *H.* 41 *Geo.* 3. 367

PRISONER AT WAR,

See COSTS, 5.

PRIVILEGE,

See FRANKING.

PROCEEDINGS, STAYING AND SETTING ASIDE,

See STAYING AND SETTING ASIDE PROCEEDINGS.

PROCESS,

See AMENDMENT, 1.
EXTORTION, 1.
PRACTICE, 2. 15.
TIME, 1.

1. The day inserted in a notice to appear to a common *capias* muſt be the return day of the writ. *Ruſhton* v. *Chapman*, *M.* 41 *Geo.* 3. *Page* 340
2. The Court will not ſet aſide proceedings and order the bail bond to be delivered up, becauſe a Defendant has been arreſted on a ſpecial *capias*, in which, as well as in the affidavit to hold to bail, the initials only of his Chriſtian name were inſerted. *Howell* v. *Coleman*, *T.* 41 *Geo.* 3. 466

PROMISSORY NOTE,

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

R.

RACE,

See WAGER, 1.

RECOGNIZANCE,

See AMENDMENT, 2.
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See COMMON RECOVERY.

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See PRACTICE, 14.
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See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.

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See AID-PRAYER, 1, 2.
PLEADING, 28, 29.

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See FRANKING.

S.

SALE,

See FRAUDS, STATUTE OF, 1, 2.

SCIRE FACIAS,

See AMENDMENT, 2.

SAILOR,

See WAGES, 1, 2.

SEA-SHORE,

1. *Primâ facie* every ſubject has a right to take fiſh found upon the ſea-ſhore between high and low water mark. *Bagott* v. *Orr*, *T.* 41 *Geo.* 3. *Page* 472
2. But ſuch general right may be abridged by the exiſtence of an excluſive right in ſome individual, *id.* *ib.*
3. *Quere*, If there be a *primâ facie* right in every ſubject to take fiſh ſhells found on the ſea-ſhore between high and low water mark? *id.* *ib.*

SERVICE,

See PRACTICE, 7. 11.

SHERIFF,

See ESCAPE, 1, 2.
PLEADING, 26, 27.
PRACTICE, 3.

SHIP,

See WAGES, 1, 2.

1. A foreign built ſhip *Britiſh*-owned is not required to be regiſtered. *Long* v. *Duff*, *T.* 40 *Geo.* 3. 209
2. Such a ſhip may therefore ſail without convoy, being within the exception of the convoy act 38 *Geo.* 3. *c.* 70. *ſ.* 6. *id.* *ib.*

SLANDER,

See PLEADING, 14, 15.

STAMPS,

See EVIDENCE, 7.

1. A mere cognovit need not be ſtamped. *Ames* v. *Hill*, *E.* 40 *Geo.* 3. 150

2. But if it contain any terms of agreement it must, *id.* Page 150
3. An agreement to confess judgment for 30*l.* to secure 5*l.* and costs, is not an agreement for more than 20*l.* within the 23 *Geo.* 3. *c.* 58. *s.* 4. and therefore need not be stamped, *id.* *ib.*
4. An unstamped draft drawn on *A. B.* bricklayer is not within the exception of 23 *Geo.* 3 *c.* 49. *s.* 4. in favour of drafts drawn on persons acting as bankers within ten miles of the place where the draft is drawn *Castleman* v. *Roy*, *E.* 41 *Geo.* 3. 383
5. A written agreement for the sale of all the hops which shall be grown upon a certain number of acres of land, to be delivered in pockets at a certain place, cannot be given in evidence unless stamped with an agreement stamp; such an agreement not being within the exception in the 23 *Geo.* 3. *s* 4. respecting agreements for the sale of goods, wares, and merchandizes. *Waddington* v. *Bristow*, *T.* 41 *Geo.* 3. 452

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STAYING AND SETTING ASIDE PROCEEDINGS.

1. If *A.* and *B.* having recovered in ſeparate actions for libels againſt different parties engaged in the management and publication of the ſame newſpapers, commence freſh actions againſt the ſame parties, each ſuing that party againſt whom the other has recovered, the Court will not interfere in a ſummary way to ſet aſide the latter proceedings. *Martin* v. *Kennedy*, *H.* 40 *Geo.* 3. 69
2. The Court will not ſtay proceedings in an action, on the ground of a bill depending in Chancery for the ſame cauſe. *Murphy* v. *Cadell*, *E.* 40 *Geo.* 3. 137
3. When only two of three joint contractors are ſued, the Court will not ſtay proceedings upon the bail bond, unleſs the defendants undertake not to plead in abatement. *Govett* v. *Johnſon*, *T.* 41 *Geo.* 3. 465
4. The Court will not ſet aſide proceedings, and order the bail bond to be delivered up, becauſe a Defendant has been arreſted on a ſpecial *capias*, in which, as well as in the affidavit to hold to bail the initials only of his Chriſtian name were inſerted. *Howell* v. *Coleman*, *T.* 41 *Geo.* 3. 466

STOCK-JOBBING.

See PLEADING, 14. 15.

STOPPAGE IN TRANSITU.

A. living at *N.* in *Devonſhire*, ordered goods of *B.* in *London*, who ſent them by ſhip to *Exeter*, conſigned to *A.*, and adviſed him thereof; on their arrival at *Exeter* they were delivered to *C.* a wharfinger, who received them on *A.*'s account and paid the freight and charges; after their arrival *A.* wrote to *B.* informing him that in conſequence of his affairs being deranged he ſhould not take the goods, and telling him that they were at *Exeter*; at this time *A.* had committed an act of bankruptcy, upon which he was afterwards declared a bankrupt; *B.* applied to *C.* for the goods, and tendered him the freight and charges due, upon which *C.* promiſed not to deliver them out of his cuſtody, but afterwards did deliver them to the aſſignees of *A.* though indemnified by *B.*: Held, 1ſt. that *B.* had a right to ſtop the goods in the hands of *C.*; and, 2dly, that he might maintain trover for them againſt *C.* *Mills* v. *Ball*, *T.* 41 *Geo.* 3. Page 457

SUGGESTION.

See COURTS, 1.

SUPERSEDEAS.

See PRACTICE, 25.

SURETY.

See CONTRIBUTION.

T

TENDER.

Bank notes are not made legal tender by the 37 *Geo.* 3. *c.* 45. *Grigby* v. *Oakes*, *M.* 42 *Geo.* 3. 526

TIME.

In a penal action a *capias ad reſpondendum*, iſſued within a year after the offence committed, but was never ſerved on the Defendant or returned; after the expiration of the year, but in the ſame term a *capias per* conti-

continuance issued, and was duly served and returned; the declaration was of the term in which both writs issued: Held that the first writ not having been returned could not be connected with the second so as to support the action. *Stanway q. t. v. Perry, E. 40 Geo. 3.* *Page* 157

TITHES.

1. Hops are by law titheable after they are picked from the bind. *Knight v. Halsey in Error, E. 40 Geo. 3.* 172
2. And no usage can vary this rule, *id.* *ib.*
3. No evidence is sufficient to support a real composition, unless it have some reference to a deed of composition, *id.* *ib.*

TOLL.

See MORTGAGE, 1.

TOWING-PATH.

See INCLOSURE ACT.

TRESPASS.

See DAMAGES, 1.
JUDGMENT 1.
TRESPASS, 22.

A private person may justify breaking and entering the house of another, and imprisoning his person in order to prevent him from committing murder on his wife. *Hancock. v. Baker, T. 40 Geo. 3.* 260

TROVER.

See STOPPAGE IN TRANSITU.

1. *A.* entrusted *B.* with goods to sell in *India*, agreeing to take back from *B.* what he should not be able to sell, and allowing him what he should obtain beyond a certain price, with liberty to sell them for what he could get if he could not obtain that price. *B.* not being able to sell the goods in *India* himself, left them with an agent to be disposed of by him, directing the agent to remit the money to himself in *England*: Held that *A.* could not maintain trover against *B.* for the goods. *Ironside v. Cornell, E. 41 Geo. 3.* 438
2. *A.* having agreed to purchase of *B.* the remainder of a term, the latter delivered to him the lease in order to get an assignment made out; *A.* then obtained an enlargement of the term from the original landlord, and refused to accept an assignment, or pay the full price agreed on, because *B.*'s undertenant had removed some fixtures: Held that *B.* might insist on *A.* accepting the assignment, and after demand and refusal of the lease might maintain trover for it. *Parry v. Frame, T. 41 Geo. 3.* *Page* 451

TURNPIKES.

See MORTGAGE, 1.

TYTHES.

See TITHES.

V.

VARIANCE.

See AMENDMENT, 1.
INSURANCE, 6.
PLEADING, 4, 5, 6, 11, 24.
PRACTICE, 2.

1. An agreement entered into between *A.* and *B.* respecting a horse race was indorsed "*N. B.* to start p. p. 15 days from this date." In a declaration on this agreement no notice was taken of the indorsement; and no evidence was given at the trial to explain the meaning of the letters "p. p." The Court after verdict held that the variance between the agreement declared on and that given in evidence was not material, the letters "p. p." being insensible. *Whaley v. Pujet, M. 40 Geo. 3.* 51
2. In an action for non-residence the parish was styled in the declaration *St. Ethelburg*; evidence was given that the real name was *St. Etheburga*: Held a fatal variance. *Wilson, q. t. v. Gilbert Clerk, M. 41 Geo. 3.* 261
3. If the writ be that the Defendant answer in "a certain plea of trespass on the case on promises," and the declaration be in debt for goods sold and delivered, and money borrowed, the Court will discharge the Defendant on entering a common appearance. *Kerr v. Sheriff, H. 41 Geo. 3.* 358

VENUE.

See PLEADING, 10.
USURY, 2.

Q.

QUARE IMPEDIT.

1. In *quare impedit* the Defendant pleaded that one *M. O.*, under whom he claimed, being ſeiſed in fee of one moiety of the advowſon to preſent to one turn in every two turns, preſented one *J. O.* in her proper turn; that the church being afterwards vacant, one *J. W.*, under whom the Plaintiff claimed, preſented in his proper turn; that the church being again vacant, the Plaintiff preſented; and that the church being a fourth time vacant, it belonged to the Defendant to preſent. On demurrer to this plea, the Court held that the Defendant had not ſhewn a title to preſent, ſince he had not ſhewn whether the third preſentation was by uſurpation or by agreement, and that it could not be preſumed that the Defendant was entitled to preſent in the firſt and fourth turn, and the Plaintiff in the ſecond and third, ſince the plea averred that *M. O.* had preſented to the firſt turn in her proper turn, and *J. W.* in his proper turn. *Birch* v. *The Biſhop of Litchfield and Coventry*, T. 43 *Geo.* 3. *Page* 444

2. *Semb.* that if it had appeared by the plea that the Plaintiff had preſented to the third turn by uſurpation, he would ſtill have been entitled to the fourth turn by right. *ib.*

R.

RATE.

The Maſters in Chancery are not rateable as occupiers of their reſpective apartments in *Southampton Buildings* under the paving act 11 *Geo.* 3. 22. *Holford* v. *Copeland*, E. 42 *Geo.* 3. 12)

RECOVERY,

See COMMON RECOVERY.

REGULÆ GENERALES,

See PRACTICE, 4. 18. 19.

RELEASE,

See BANKRUPT, 7.

REPLEVIN.

See PROCEEDINGS, STAYING AND SETTING ASIDE, 1.

RESCINDING CONTRACT.

See LIEN, 1.

RESIGNATION BOND.

Judgment in *K. B.* in an action upon a reſignation bond given by a ſchool-maſter affirmed in the Exchequer chamber, it not appearing upon the pleadings that the office was a freehold. *Lewis* v. *Legh*, *M.* 43 *G.* 3. *Page* 231

RETURN OF PREMIUM.

See INSURANCE, 2.

REVOCATION,

See DEVISE, 1.

RIGHT, WRIT OF,

See AMENDMENT, 4.
PLEADING 12.

RULE TO PLEAD,

See PRACTICE, 10.

S.

SALE,

See GOODS SOLD AND DELIVERED, 1, 2.
MONEY HAD AND RECEIVED, 1, 2.
STATUTE OF FRAUDS, 1.
VENDOR AND VENDEE, 1, 2.

SALVAGE.

A ſhip being in danger, and the captain and part of the crew having made their eſcape, a paſſenger, at the requeſt of the reſt of the crew, took the command and brought the ſhip ſafe to port. The merits of the paſſenger in ſaving the ſhip were acknowledged by the owner in a letter to one of the underwriters, wherein he expreſſed his deſire to make him a compenſation. Held that the paſſenger was entitled to ſue the owner for the ſalvage. *Newman* v. *Walters*, *H.* 44 *Geo.* 3. 612

SCHOOLMASTER,

See RESIGNATION BOND, 1.

SCIRE FACIAS,

See AMENDMENT, 1.

SEAMAN'S WAGES.

See SLAVE, 1.

1. A seaman who quits his ship after her arrival in port, but before she is moored, does not thereby subject himself to the forfeiture of the whole of his wages under the 2 *Geo.* 2. *c.* 36. *s.* 3. *Frontine* v. *Frost*, *M.* 43 *Geo.* 3. *Page* 302

2. To entitle the master to deduct a month's wages for the benefit of *Greenwich* hospital under the 2 *Geo.* 2. *c.* 36. *s.* 6. and 9. it is incumbent on him to shew that the seaman quitted his ship without leave in writing, *ib.*

3. And such a deduction cannot be set off by the master in an action for wages by the seaman, unless the master has previously debited himself to *Greenwich* hospital for the amount in a book kept according to the direction of the statute, *ib.*

4. *Qu.* Whether the crews of the *British* ships detained in *Russia* under the orders of the *Russian* government in the year 1800 were entitled to wages for the time during which the ships were so detained. *Beale* v. *Thompson*, *E.* 43 *Geo.* 3. 405

SENTENCE OF CONDEMNATION,

See INSURANCE, 12, 13, 14.

SERVICE,

See AWARD.

SET-OFF,

See SEAMAN'S WAGES, 3.

SHERIFF,

See PRACTICE, 7.
TRESPASS, 1.

SHIP'S REGISTRY,

See EVIDENCE, 1.

SLANDER,

See PLEADING, 6.

1. Action on the case for saying of a merchant, "he has brought a false bill of lading for half the cargo (meaning the lading of a particular ship) already," whereby he was injured as such merchant, and lost the confidence of several persons, (without naming them,) was held not maintainable, and judgment accordingly arrested, because the words did not of themselves impute any crime. *Feise* v. *Linder*, *E.* 43 *G.* 3. *Page* 372

2. Although a master be not in general bound to prove the truth of a character given by him to a person applying for the character of his servant, yet if he officiously state any trivial misconduct of the servant to a former master in order to prevent him giving a second character, and then himself upon application for a character, give the servant a bad character, the truth of which he is not able to prove, the jury may from these circumstances infer malice against the master in an action against him by the servant. *Rogers* v. *Clifton*, *M.* 44 *Geo.* 3. 587

SLAVE.

Plaintiff agreed to serve as a seaman during a voyage to and from the *West Indies*; on his arrival there he was claimed as a runaway slave, and delivered up to his master; whereupon it was agreed between the Plaintiff, his master, and the captain, that upon payment of a sum of money by the captain to the master, the latter should manumit the Plaintiff, he covenanting to serve the captain as a seaman for three years at certain stipulated wages. The Plaintiff was accordingly manumitted, and having served the captain upon the homeward voyage, commenced an action against him to recover wages for that voyage upon a *quantum meruit*. Held that he was estopped by his covenant from claiming more than the sum stipulated. *Williams* v. *Brown*, *H.* 42 *Geo* 3. 69

STAMPS,

See POST-OFFICE, 1.

An unstamped banker's check, post-dated, is void. *Whitwell* v. *Bennett*, *M.* 44 *Geo.* 3. 559

STATUTE OF FRAUDS.

A. having sent to *B.* a bale of sponge under a verbal order from the latter, for which he charged

charged 11*s.* *per* pound; *B.* returned it, and at the same time wrote a letter to *A.* stating that he had examined the sponge, and finding that it was not worth more than 6*s.* *per* pound, he had sent it back. Held that this letter did not amount to such an acceptance of the goods as would take the case out of the statute of frauds. *Kent* v. *Huskinson*, *M.* 43 *Geo.* 3. *Page* 233

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STOPPAGE IN TRANSITU,

See LIEN, 2.

1. An uſage for carriers to retain goods as a lien for a general balance of account between them and the conſignees cannot effect the right of the conſignor to ſtop the goods *in tranſitu*. *Oppenheim* v. *Ruſſell*, *H.* 42 *Geo.* 3. 42
2. *Semb.* that ſuch a lien could not be eſtabliſhed even by agreement between the carrier and the conſignor, *ib.*
3. *A.* the general agent in *London* of *B.* and Co. a houſe at *Paris*, with power to export for them to ſuch markets as he ſhould think fit, purchaſed goods in the name of *B.* and Co. of *C.* at *Manchester*, and directed them to be ſent to *D.* a packer in *London*. After their arrival *A.* had ſome of the goods unpacked and ſent away, and the remainder repacked. News then arrived of the failure of *B.* and Co. Held that the goods in *D's* hands were no longer *in tranſitu*, and that *C.* therefore had no right to ſtop them. *Leeds* v. *Wright*, *H.* 43 *Geo.* 3. 320
4. On the 16th of *March* 1802, goods were forwarded from *Manchester*, addreſſed to *A.* at the *Bull-and-Mouth* Inn, *London*, in conſequence of a previous order from him. On the 23d of the ſame month the goods were ſent to the Defendant's houſe as the packer of *A.*, the latter having given no direction at the *Bull-and-Mouth* Inn reſpecting the particular goods; but having given a general order that all goods addreſſed to him ſhould be ſent to the Defendant, *A.* having no warehouſe of his own. On the 11th of *March* *A.* committed an act of bankruptcy. When s arrived at the Defendant's they were booked to the account of *A.*, and the Defendant not knowing of *A's* bankruptcy, unpacked the goods to aſcertain the contents. On the 31ſt of *March* the goods were claimed by the conſignees, and on the day after by the aſſignees of *A.* againſt whom a commiſſion had been taken out. Held that the *tranſitus* of the goods was at an end when they arrived at the Defendant's houſe, and conſequently, that the Plaintiffs, as the aſſignees of *A.*, were entitled to recover them in an action of trover. *Scott* v. *Pettit*, *T.* 43 *Geo.* 3. *Page* 469

SURRENDER,

See PRACTICE, 13.

T.

TENANT-RIGHT ESTATES,

See PARTITION, 1.

TENDER,

See PLEADING, 9.

TITLE,

See BANKRUPT, 9.
MONEY HAD AND RECEIVED, 1, 2.

TRADE,

See BANKRUPT, 3.
LICENCE, 1.

TRESPASS.

1. *Semb.* that a ſheriff's officer acting under civil proceſs, may juſtify breaking the inner doors of the Defendant's houſe, though he be not therein at the time. *Ratcliffe* v. *Burton*, *M.* 43 *Geo.* 3. *Page* 223
2. But in ſuch caſe the officer muſt firſt demand admittance, *ib.*

TRIAL.

If a Defendant die on the night before the trial of a cauſe at the ſittings in term, a verdict obtained in ſuch cauſe, and the judgment entered up thereon will be ſet aſide upon application to the Court. *Taylor* v. *Harris*, *M.* 44 *Geo.* 3. 549

TRUST,

See BANKRUPTCY.

U.

UNIVERSITIES,

See LAND-TAX, 1.

USURPATION.

See QUARE IMPEDIT, 1.

USURY,

See AMENDMENT, 2.

1. The grantor of an annuity having agreed with the grantee to redeem, drew a bill of exchange for 5000*l.* at three years, which the grantee discounted in the following manner: he took 4083*l.* 6*s.* 8*d.* as the amount of the purchase money and arrears, advanced 166*l.* 13*s.* 4*d.* to the grantor in cash, and took 750*l.* as interest for 3 years upon 5000*l.* Held that the transaction was usurious. *Sir Charles Marsh* v. *Martindale*, *E.* 42 *Geo.* 3. 154
2. If more than legal interest be taken for forbearance on a note given to *A.* by *B.* as a collateral security for money lent to *C.*, such money is well described to be forbearance of money lent by the Defendant to *B.* *Manners qui tam* v. *Postan*, *H.* 43 *Geo.* 3. *Page* 343

V.

VARIANCE,

See PLEADING, 4.

If a bill drawn by *John Crouch* be declared upon as drawn by *John Couch* the variance is fatal. *Whitwell* v. *Bennet*, *M.* 44 *Geo.* 3. 559.

VENDOR AND VENDEE.

1. Delivery of goods by the vendor on behalf of the vendee to a carrier not named by the vendee is a delivery to the vendee. *Dutton* v. *Solomonson*, *M.* 44 *Geo.* 3. 582
2. *A.* delivered goods under the value of 40*s.* to a carrier in *London*, pursuant to an order from *B.* resident in *Leicestershire*, and received the goods in the latter county. Held that no action for the goods could be maintained in the county court of *Leicestershire*, and that the Court of Common Pleas therefore could not stay proceedings in an action commenced in that court. *Harwood* v. *Lester*, *H.* 44 *Geo.* 3. 617

VENUE,

See INDICTMENT, 2.
PRACTICE, 2, 3. 22.
VENDOR AND VENDEE, 2.

VERDICT,

See PLEADING, 10.
TRIAL, 1.

W.

WAGES,

See SEAMAN'S WAGES.
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See PRACTICE, 1.

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